TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 146.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, PETITIONER,

vs.

C. C. WHITNACK PRODUCE COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

PETITION FOR CERTIORARI FILED OCTOBER 3, 1921.

CERTIORARI AND RETURN FILED NOVEMBER 30, 1921.

(27,927)

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a Supreme Court of Nebraska.

General Number 20643.

C. C. WHITNACK PRODUCE CO.

v.

C. & N. W. R. CO.

b In the Supreme Court of the State of Nebraska.

C. C. WHITNACK PRODUCE COMPANY, etc., Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Clerk's Transcript & Defendant's Bill of Exceptions.

1 & 2 Pleas in the District Court, Third Judicial District of Nebraska, within and for Lancaster County, at the January, A. D. 1918, Term of said Court, Begun and Held in the City of Lincoln, in said County and State, on the 31st day of January, A. D. 1918, *in the year of our Lord One Thousand Nine Hundred and Eighteen*, on a Day Therein, to wit, on the 18th Day of February, A. D. 1918 (that Being the 15th Judicial Day of the January, A. D. 1918, Term of said Court).

Present: Honorable W. M. Morning, Judge presiding; L. A. Simmons, Sheriff and J. S. Baer, Clerk.

Be it remembered that at the several times hereinafter set forth were filed in the office of the Clerk of said Court papers of which the following are true and correct copies and proceedings were had and done in the cause below named as follows to-wit:

Amended Petition.

In the District Court of Lancaster County, Nebraska.

60-292

C. C. WHITNACK PRODUCE COMPANY, a Co-partnership, Consisting of Charles C. Whitnack and John T. Lyle, Co-partners, Doing Business under the Firm Name and Style of C. C. Whitnack Produce Company, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Defendant.

First Cause of Action.

Comes now the plaintiff and for a first cause of action herein alleges and says:

1. That it is a co-partnership composed of Charles C. Whitnack and John T. Lyle doing business under the firm name and style of C. C. Whitnack Produce Company and has been doing business as a partnership under the said name and stayle since on or about August 1, 1914, and that the defendant is a corporation organized under and by virtue of the laws of the state of Illinois, doing business in the state of Nebraska under the laws thereof.

2. Plaintiff further alleges and says that the defendant
3 operates a railway and is in the business of receiving and carrying freight thereover as a common carrier from Gibson, Indiana, to Lincoln, Nebraska, and from Lincoln, Nebraska, to Clarkson, Nebraska, and that in the month of November, 1914, the defendant received for shipment over its line at Gibson, Indiana, Car No. L. S. & M. S. 140,156 containing Baldwin and Northern Spy apples of A and B grades in bulk consigned to this plaintiff, or to its agent, G. W. Pickering, at Lincoln, Nebraska, and that this defendant thereupon carried said car in transit over its line of railroad and on its arrival plaintiff diverted and rebilled said car of apples over the said defendant's line from Lincoln to Clarkson, Nebraska, said car being carried by this defendant from Lincoln to Clarkson, Nebraska, and that said shipment was made under a contract or bill of lading which the plaintiff is unable to produce for the reason that it returned the same to the defendant at the time that it made a claim for damages as hereinafter alleged and the said bill of lading has not been returned to plaintiff by the defendant.

3. Plaintiff further alleges and says that in the transportation of said car of apples from Gibson, Indiana, to Clarkson, Nebraska, the defendant road, its agents, servants and employees, carelessly and negligently permitted said car of apples to become frozen and that this defendant delivered said car of apples to this plaintiff and its

consignees at Clarkson, Nebraska, badly frozen and damaged, said apples being largely unmarketable upon delivery as a result of their condition.

4. Plaintiff further alleges and says that upon arrival of said car of apples it was put to great expense in the resorting and reselling of said apples, said resorting and reselling being rendered necessary because of the condition of said apples which was due directly to the negligence and carelessness of the said defendant, its servants, agents and employees.

4 5. Plaintiff further alleges and says that it has been damaged by the carelessness and negligence of the defendant, its agents, servants and employees, in permitting said apples to become frozen, and damaged as aforesaid, in the sum of $293.37, more particularly specified as follows:

270 bu. apples total loss @ 75¢ per bu.	$202.50
236 bu. apples damaged 25¢ per bu.	59.00
Carried forward	$261.50
Brought forward	$261.50
Labor sorting at Lincoln	3.00
Labor sorting at Dodge & Clarkson	14.75
Expense of G. W. Pickering, agent of plaintiff in looking after this car at Dodge & Clarkson	17.32
Total	$296.57

There were culls sold from said apples netting $3.20, leaving a net loss of $293.37.

6. Plaintiff further alleges and says that it made out and presented to the defendant a claim for said damage as aforesaid in the sum of $293.37 on or about the 26th day of December, 1914, and the defendant rejected and refused to pay the said claim or any part thereof and has at all times since refused to pay said claim or any part thereof, and there is due from the defendant to the plaintiff for loss as aforesaid the sum of $293.37 together with interest thereon at the rate of seven per cent per annum from the — day of December, 1914.

Second Cause of Action.

Comes now the plaintiff and for a second cause of action herein alleges and says:

1. The plaintiff, for its first paragraph herein, expressly refers to paragraph one of the first cause of action herein and makes the same a part hereof.

5 2. That the defendant herein operates a line of railroad from Gibson, Indiana, to Lincoln, Nebraska, and is engaged in receiving and carrying freight thereover as a common carrier

and that during the month of November, 1914 said defendant received for shipment over its line at Gibson, Indiana car No. S. F. R. D. 8546 of Baldwin and Northern Spy apples of A and B grades in bulk consigned to G. W. Pickering as the agent for and in behalf of this plaintiff, said shipment being made under a written contract or bill of lading, the original of which is in the possession of the defendant.

3. Plaintiff further alleges and says that the defendant herein, its agents, servants and employees, wrongfully, carelessly and negligently permitted said apples in said car, being car No. S. F. R. D. 8546, to become frozen and damaged in transit from Gibson, Indiana, to Lincoln, Nebraska, as aforesaid, and that as a result of said condition of the apples upon delivery to the plaintiff and its consignee at Grand Island, Nebraska, this plaintiff was unable to effect and complete the contract for the sale of said apples with the consignee at Grand Island and was compelled to sell the same at the best price obtainable considering the condition of said apples in the open market and that as a direct result of the carelessness, negligence and wrongful conduct of this defendant, its agents, servants and employees in permitting said apples to become badly frozen and damaged, this plaintiff has been damaged in the sum of $218.76, which is explained in detail as follows: The said car contained 29,520 pounds of bulk apples worth $1.30 per hundred-weight, f. o. b. Lincoln, or $383.76, and that in the shipment from Lincoln to Grand Island as aforesaid there were removed or stolen from the said car apples amounting in value, at the above price, of $65.00, leaving a balance in the said car of apples that were worth at the price above named of $1.30 per hundred-weight f. o. b. Lincoln, of $318.76, and because of the said damaged condition of the said apples
6 the plaintiff was compelled to sell the same for $100.00 which was all the apples were worth because of said damaged condition, causing a loss to the plaintiff in the sum of $218.76.

4. That plaintiff made out and presented to the defendant a claim for said damages in the sum of $218.76 on or about the 26th day of December, 1914, which claim was refused and rejected by the defendant and the defendant refused at that time and at all times since to pay the plaintiff the said damage or any part thereof.

Third Cause of Action.

Comes now the plaintiff and for a third cause of action herein alleges and says:

1. The plaintiff, for its first paragraph herein, expressly refers to paragraph one of the first cause of action herein and makes the same a part hereof.

2. That the defendant railroad operates and did operate during the month of February, 1914, a line of railroad from Omaha, Nebraska, to Lincoln, Nebraska, and on the 21st day of February, 1914, was engaged as a common carrier, and said defendant on said date

received in the due course of business for shipment from Charles C. Whitnack doing business as the C. C. Whitnack Produce Company, one car, No. C. & N. W. 14466, of apples consigned to the C. C. Whitnack Produce Company at Lincoln, Nebraska, which apples were composed of Ben Davis and Winesaps of first grade and were contained in 408 boxes and 50 barrels, which were shipped under a written contract contained in a bill of lading, a copy of which is in the possession of the defendant.

3. That said apples were delivered by the defendant to the C. C. Whitnack Produce Company at Lincoln, Nebraska, in a frozen and damaged condition which was directly caused by the carelessness, negligence and wrongful conduct of the defendant, its agents, servants and employees.

7 4. That as a result of said damaged condition of said apples as aforesaid this plaintiff was put to the expense of resorting and reselling of said apples upon arrival and repacking of same, and this plaintiff has been damaged by the carelessness, negligence and wrongful conduct of this defendant, its servants, agents and employees in permitting and causing said apples to become frozen and damaged in transit as aforesaid in the sum of $127.75 which amount is made up more specifically as follows:

28 bbls. frozen apples sorted from entire car @ $4.50 per barrel	$126.00
Labor in sorting the same	16.00
Total	$142.00

and there was received from the sale of twenty-eight barrels of apples assorted as aforesaid the sum of $14.25, leaving a net loss to the plaintiff of $127.75.

5. That the C. C. Whitnack Produce Company, to whom the said apples were consigned made and presented claim for said loss to the defendant on or about the — day of June, 1914, and the defendant rejected and refused to pay the said claim and has at all times since rejected to pay the said claim or any part thereof; and that the said C. C. Whitnack, doing business as the C. C. Whitnack Produce Company for a valuable consideration duly assigned the said claim to the C. C. Whitnack Produce Company, Plaintiff herein.

6. That by reason of the facts hereinbefore stated there is due from the defendant to the plaintiff the sum of $127.75 with interest thereon at the rate of seven per cent per annum from the — day of June, 1914.

Wherefore, plaintiff prays for judgment against the defendant for the sum of $293.37 with interest thereon at the rate of seven per cent per annum from the 26th day of December, 1914, on the first cause of action set out herein, and for the sum of $218.76 with interest thereon at the rate of seven per cent per annum from
8 the 26th day of December, 1914, on the second cause of action

set out herein, and for the sum of $127.75 with interest thereon at the rate of seven per cent per annum from the — day of June, 1914, and the costs of this action including a reasonable attorney's fee to be fixed by the court as in such cases made and provided under the statutes of the state of Nebraska.

BURKETT, WILSON & BROWN,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Lancaster County, ss:

Charles C. Whitnack, being first duly sworn, deposes and says that he is one of the partners composing the firm of the C. C. Whitnack Produce Company and that he has read the within and foregoing petition and that the statements and allegations therein contained are true as he verily believes. CHARLES C. WHITNACK.

Subscribed in my presence and sworn to before me this 3rd day of February, 1917. ELMER W. BROWN,
[SEAL.] *Notary Public.*

Endorsed: 60-292. In the District Court of Lancaster County, Nebraska. C. C. Witnack Produce Co., etc., Plaintiff, vs. Chicago & Northwestern Railway Company, a corporation, Defendant. Amended Petition. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 3, 1917. J. S. Baer, Clerk District Court.

Answer.

In the District Court of Lancaster County, Nebraska.

9 No. 60-292.

C. C. WHITNACK PRODUCE COMPANY, a Copartnership, Consisting of Charles C. Whitnack, and John T. Lyle, Copartners, Doing Business under the Firm name and Style of C. C. Whitnack Produce Company, Plaintiff,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Comes now the defendant and for answer to plaintiff's petition denies generally and specifically each and every statement, matter, allegation, or thing therein contained, save and except such as may be hereinafter admitted, more fully answered, or otherwise explained.

1.

The defendant admits that it is a corporation, substantially as alleged in plaintiff's petition.

2.

Further answering and especially as to plaintiff's first cause of action, defendant alleges that said shipment originated at Youngstown, New York, on November 6, 1914, upon the lines of the Niagara Gorge Railroad Company, and that said Company was the initial carrier of said shipment. That plaintiff's agent consumed from the said 6th day of November to the 10th of November in loading said car. That thereafter the Niagara Railroad Company delivered the said shipment to the New York Central Railroad Company which in turn delivered the car to the Michigan Central Railroad Company, which in turn delivered the car to the Indiana Harbor Belt Railroad Company, which in turn delivered said shipment to the defendant herein, at Proviso, Illinois, on November, 15, 1914. That this defendant carried said shipment from said Proviso, Illinois to Council Bluffs, Iowa, and at such point delivered the same to the Union Pacific Railroad Company on the 18th day of November, 1914. That thereafter and on the 23rd day of November, 1914, the Union Pacific Railroad Company delivered the shipment to the Chicago and North Western Railway Company at Omaha, Nebraska. Thereafter this defendant carried said shipment from Omaha, to Lincoln, Nebraska, where it arrived on the 24th day of November, That on the 28th day of November, the car was ordered forwarded, it going to Dodge, Nebraska where it was partially unloaded. That thereafter it was forwarded to Clarkson, Nebraska, arriving at such point on the 5th day of December, 1914.

3.

That said shipment was interstate shipment moving from a point in the State of New York, to-wit: Youngstown, to a point in the State of Nebraska, to-wit; Clarkson, and constituted and was interstate commerce and subject to the laws governing such commerce.

4.

That this defendant received and transported the said shipment as a connecting carrier and terminal carrier only.

5.

That this defendant transported said shipment with due diligence and dispatch without fault or negligence on its part.

6.

Further answering defendant alleges that plaintiff is not the real party in interest as to this count of plaintiff's petition.

7.

Further answering and as to count two of plaintiff's petition, defendant alleges that said shipment was an interstate shipment moving

from a point in the state of New York to-wit: Ransomville, to a point in the state of Nebraska, to-wit: Lincoln and that the same constituted and was inter-state commerce, subject to all of the laws and rules governing such commerce.

11

8.

Defendant further answering alleges that said shipment was handled en route by the New York Central Railroad Company, the Michigan Central Railroad Company, the Indiana Harbor Belt Railroad Company, and that this defendant received the said shipment from the said Indiana Harbor Belt Railroad Company, on the 16th day of November, 1914 at Proviso, Illinois. That thereafter the defendant carried the same with due diligence and dispatch without fault or negligence and delivered the same to the plaintiff at Lincoln, in the same condition as when received by it at Proviso, Illinois.

9.

That thereafter the defendant ordered said car forwarded from Lincoln on the lines of the Union Pacific Railroad Company to Grand Island, Nebraska, and for anything that occurred to such shipment from said Lincoln to said Grand Island, this defendant is not liable.

10.

That this defendant handled said shipment as connecting and terminal carrier only.

11.

That the plaintiff is not the real party in interest in this suit.

12.

Further answering and as to plaintiff's third cause of action defendant alleges that when said shipment was tendered to this defendant at Omaha, Nebraska, the weather conditions were such that the same could not be safely transported, and that defendant declined to receive the same for transportation.

13.

That on account of the said freezing condition of the weather, and the peculiarly perishable nature of the commodity, the defendant could not, acting with all due care in the premises, transport said shipment without serious danger to loss from freezing.

12

14.

That when said conditions were explained to plaintiff or plaintiff's agents, that plaintiff's agents stated that they desired to ship the

apples anyway and were willing to assume themselves, the risk of freezing.

15.

That thereupon a contract in writing was entered into by and between the defendant and the plaintiff, or the plaintiff's agents, which said contract was embodied in the bill-of-lading, issued to plaintiff or plaintiff's agents, and said shipment was accepted for transportation under the express understanding and agreement that it should be carried at "owner's risk of freezing."

16.

That after said shipment was received by the defendant it transported the same without negligence, and with due diligence and dispatch, and if any of said apples were frozen or otherwise damaged, that said damages was due to the act of God and not to any fault or neglect of this defendant.

17.

That apples such as the apples shipped in this particular shipment, at the time of year at which this shipment moved, are inherently subject to damage by freezing temperature, and if said apples were damaged, such damage was due and owing to the natural inherent propensity and perishable nature of said fruit.

18.

Further answering and as to all of the counts of plaintiff's petition and particularly as to plaintiff's prayer for attorneys' fees defendant alleges that plaintiff is not entitled to recover any attorneys' fees herein, for the reason that the pretended Statute of Nebraska under which said attorneys' fees is claimed is unconstitutional and void, in that it regulates Interstate Commerce in contraven-
13 tion of Article One, Section Eight, of the Constitution of the United States.

19.

Defendant denies that in any event is plaintiff entitled to recover an attorneys' fee, for the reason that the pretended statute of Nebraska, being Section 6063, under which said Attorneys' Fee is claimed, is unconstitutional and void, as depriving defendant of its property without due process of law and denying to the defendant the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and in violation thereof.

Wherefore, defendant having fully answered prays that plaintiff's petition be dismissed and for its costs herein expended.

A. A. McLAUGHLIN,
WYMER DRESSLER,
LYLE HUBBARD,
Attorneys for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss:

I, Lyle Hubbard, being first duly sworn, on oath depose and say that the above named defendant is a corporation; that I am one of the attorneys for such corporation; that as such attorney I have read the foregoing answer and the same is in all things true as I verily believe.

LYLE HUBBARD.

Subscribed and sworn to before me this 17th day of February, A. D. 1917.

W. DRESSLER,
Notary Public in and for
Douglas County, Nebraska.

Endorsed: 60–292. In the District Court of Lancaster County, Nebraska. C. C. Whitnack Produce Company, a co-partnership consisting of Charles C. Whitnack and John T. Lyle, co-partners, 14 doing business under the firm name and style of C. C. Whitnack Produce Company, Plaintiff, vs. Chicago and Northwestern Railway Company, a corporation, Defendant. Answer. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 19, 1917. J. S. Baer, Clerk Dist. Court.

Reply.

In the District Court of Lancaster County, Nebraska.

60–292.

C. C. WHITNACK PRODUCE COMPANY, a Co-partnerships, Consisting of Charles G. Whitnack and John T. Lyell, Co-partners, Doing Business under the Firm Name and Style of C. C. Whitnack Produce Company, Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation, Defendant.

Comes now the plaintiff and for reply to answer of the defendant filed herein *and* admits the allegations contained in paragraph 2 herein, except the allegations relative to the Union Pacific Railway Company, and admits paragraphs 3, 4, 7, 9, and 10, and admits that part of paragraph 8 as to the lines over which the said car was shipped.

Plaintiff further replying to the said answer denies each and every allegation contained therein not hereinbefore expressly admitted.

BURKETT, WILSON & BROWN,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Lancaster County, ss:

C. C. Whitnack, being first duly sworn, deposes and says that he is one of the partners composing the C. C. Whitnack Produce Company, plaintiff herein, and that the statements contained in the foregoing reply are true as he verily believes.

C. C. WHITNACK.

Subscribed in my presence and sworn to before me this 13th day of February.

ELMER W. BROWN,
Notary Public.

[SEAL.]

Endorsed: 60–292. Whitnack Produce, etc., vs. Chicago & N. W. R. R. Reply. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 15, 1918. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 14th day of February, A. D. 1918, (that being the 12th Judicial Day of the January, A. D. 1918, term of said court), were had and done the following proceedings as appear upon Court Journal "74" at page 13, to-wit:

60–292.

C. C. WHITNACK PRODUCE COMPANY

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Empaneling of Jury.

Now on this day come the parties hereto by their attorneys, and this cause now coming on for trial, come also the following named persons as jurors herein to-wit: Claude B. R. Knott, Frank Ohler, Albert C. Berry, George K. Gann, I. G. Chapin, Cal Thompson, Fred S. Talbot, Nick Brockema, H. E. Lidolph, George W. Aills, John W. Cooley and George Manning, all of the regular panel, who were duly empaneled and sworn herein, according to law and trial of this cause proceeds, opening statements made, and after hearing the testimony of witnesses adduced in part, and the hour of adjournment being at hand, the said jury are duly admonished by the Court, and excused until to-morrow morning at nine o'clock, to which time further proceedings herein are continued.

16 *Journal Entry.*

That on the 15 day of February, A. D. 1918 (that being the 13th Judicial Day of the January, A. D. 1918 term of said court), were

had and done the following proceedings as appear upon Court Journal "74" at page 17 to-wit:

60–292.

C. C. WHITNACK PRODUCE COMPANY

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Court Proceedings.

Now on this day come the parties hereto by their attorneys, and come also the jury heretofore empaneled herein and sworn according to law, and trial of this cause proceeds, and after hearing further testimony of witnesses adduced, and the hour of adjournment being at hand, the said jury are duly admonished by the Court, and excused until tomorrow morning at nine o'clock, to which time further proceedings herein are continued.

District Court, Lancaster County, Third Judicial District, Lincoln, Nebraska.

W. M. Morning, Judge.
Minor S. Bacon, Reporter.

60–292.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Defendant.

Instructions Given by the Court.

Gentlemen of the Jury:

1.

As to the two carloads of apples shipped from New York, which have been referred to in the evidence, it is agreed between the parties that the shipments were made as plaintiff contends, and that a part of the transportation was over the line of the defendant, the defendant not being the initial carrier but a connecting carrier,
17 and that said cars reached their destination at Lincoln, Nebraska, over the line of the defendant.

Now in order for the plaintiff to recover in this case as to either, or both, of the causes of action set up in plaintiff's petition relative

to said New York cars, the burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence:

1st. That the apples constituting said shipments were in good condition at the time they were delivered to the initial carrier in New York.

2nd. That when said cars, or either of them, reached their destination at Lincoln, Nebraska, they were in a frozen condition, and the extent to which they were frozen and the amount of damages, if any, which the plaintiff sustained as the direct and proximate result of such frozen condition. This would entitle the plaintiff to recover the damages thus shown to have been sustained.

Unless defendant has satisfied you by a preponderance of the evidence that the damage occurred before said apples were received by the defendant on its line, or that defendant used due and reasonable care to protect said apples from freezing while in its possession, and that such freezing was not due to the defendant's negligence while said apples were in its possession.

Given. W. M. Morning, Judge.

2.

You are instructed in your consideration of the shipments from the State of New York, as follows:

That if you find from the evidence the apples were in good order and unfrozen when they were put into the cars in the State of New York, and received by the railroad at those points; and you further find from the evidence that they were received at Lincoln in a frozen condition, then there is a presumption that they were so frozen by reason of the negligence of the carrier; and you are further entitled to presume that this negligence occurred while the apples were being transported over the defendant's line, it being the last carrier. This would charge the defendant with liability for the damage, unless you find from the evidence that either the apples were frozen when loaded, or, were received by the defendant in a damaged condition.

Given. W. M. Morning, Judge.

3.

If you find from the evidence that the apples were shipped in good order and were frozen when they reached Lincoln, then the burden of proof is upon the defendant to show that they were in that condition at the time they were received upon the defendant's line, or, that the defendant exercised due diligence to protect them from freezing while in its possession, by using all ordinary and customary means to that end.

Given. W. M. Morning, Judge.

4.

As to the shipment of apples from Omaha to Lincoln, which forms the basis for plaintiff's third cause of action, you are instructed that in order for the plaintiff to recover anything in this case on account of said shipment the plaintiff has the burden of proof to satisfy you by a preponderance of the evidence that when said apples were delivered to the defendant at Omaha for shipment to Lincoln they were in sound condition and in good order, and that when they reached their destination at Lincoln they were in a frozen and damaged condition, and that as the direct and proximate result of such frozen and damaged condition plaintiff has sustained dam-
19 ages, and the amount of such damages, if any.

Given. W. M. Morning, Judge.

5.

You are further instructed that so far as the shipment of the car from Omaha to Lincoln, is concerned, if you find from the evidence before you that the apples were in good order when received by the defendant at Omaha, and were in a frozen condition when they reached Lincoln, then it will be presumed that the injury to the apples was due to the negligence of the defendant and throws upon the defendant the burden of proving that it used all ordinary and usual means of protecting the apples from frost, and that the freezing of the apples was not in any manner due to the negligence of the defendant.

Given. W. M. Morning, Judge.

6.

The term "negligence" as used in these instructions means the doing of something which an ordinarily cautious and prudent person would not do, or the failure to do something which an ordinarily prudent and cautious person would do under the circumstances; in other words, it is the absence of care according to the circumstances.

Given. W. M. Morning, Judge.

6½.

If you find and believe from the evidence that either of the several carloads of apples referred to in the evidence were delivered to the defendant, or to the initial carrier in a frozen condition, and that the freezing did not take place after they were delivered to the defendant and while in defendant's custody as carrier or if frozen while in defendant's custody through no fault or negligence of defendant, then the plaintiff cannot recover as to the car, or cars,

of apples which you find from the evidence was so frozen at
20 the time of the original delivery to the first carrier, or to defendant, or which were frozen from other causes thru negligence on the part of defendant.

Given. W. M. Morning, Judge.

7.

If from the evidence before you and under these instructions you find for the plaintiffs on the New York shipments or either of them, then you will determine the amount of their damages and in ascertaining such damages you will take the cost of the apples in New York at the place of shipment and to this cost you will add the freight paid thereon to Lincoln, and from the sum thus obtained you will deduct what you may find from the evidence the apples were worth in the condition in which they were when they arrived in Lincoln, and to the amount thus obtained you will add interest thereon at seven per cent per annum from December 1st, 1914, to this date and the sum so obtained will be your verdict on such shipments.

Given. W. M. Morning, Judge.

8.

In the event you find in favor of the plaintiffs as to the shipment of apples from Omaha to Lincoln, which forms the basis of Plaintiffs' third cause of action, then in estimating the amount of plaintiffs' recovery as to said shipment, you will ascertain the reasonable and fair market value at Lincoln, Nebraska, of the said apples at the time they arrived in Lincoln, about February 23, 1914, if they arrived there unfrozen and in a sound condition; and then you will ascertain from the evidence the fair and reasonable market value of said apples in the condition in which they did arrive in Lincoln, and the difference, together with 7% interest on such difference from February 23, 1914, would constitute the measure of plaintiffs' recovery on said third cause of action.

Given. W. M. Morning, Judge.

21 9.

Proximate cause is that cause from which the result follows as a natural or probable consequence. It is the primary fault or cause where no intervening cause, disconnected therefrom and self-operating, intervenes to produce the effect.

Given. W. M. Morning, Judge.

10.

When I speak of the pre-onderance of the evidence anywhere in these instructions, I mean such weight of evidence as will produce

in your minds the stronger impression, and which on a view of the whole evidence is more convincing as to its truth when weighed against the evidence in opposition thereto.

Given. W. M. Morning, Judge.

11.

You are the sole judges of the credibility of the witnesses. In determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the result of the suit, if any is proved; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; the reasonableness or unreasonableness of the story told by them; and all the evidence, facts and circumstances proved, tending to corroborate or contradict such witnesses; and you are to give the testimony of each witness such weight as you think it entitled to in view of all the facts and circumstances appearing on the trial.

Given. W. M. Morning, Judge.

12.

You will take these instructions, together with the blank forms of verdict, which have been prepared for you, retire to your jury room, select your foreman, who will sign your verdict, and there from the evidence before you, and the law as given you in
22 these instructions, you will determine upon your verdict.

Given. W. M. Morning, Judge.

W. M. MORNING,
Judge of the District Court.

Endorsed 60-292. C. C. Whitnack Produce Co., Plaintiff, vs. Chicago & Northwestern Railway Company, Defendant. 12 Instructions Given by the Court. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 16, 1918. J. S. Baer, Clerk Dist. Court.

Instructions Requested by Defendant.

In the District Court of Lancaster County, Nebraska.

Doc. —, No. —.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,
vs.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant.

Comes now defendant at the close of all the testimony and asks the court to give to the jury, the following instructions:

A. A. McLAUGHLIN,
WYMER DRESSLER,
Attorneys for Defendant.

Instruction No. 1.

You are instructed that the evidence in this case is not sufficient to make the defendant liable for any damage shown to the shipment from Youngstown, New York, and you cannot consider that cause of action in arriving at your verdict.

Refused. W. M. Morning, Judge.

Instruction No. 2.

You are instructed that the evidence in this case is insufficient to make the defendant liable for any damage which may have been shown to the shipment from Ransomville, New York, and
23 you will not allow anything on that cause of action in arriving at your verdict.

Refused. W. M. Morning, Judge.

Instruction No. 3.

You are instructed that concerning the shipment of apples from Omaha to Lincoln, leaving Omaha on February 22nd, 1914, that the burden is upon the plaintiff to show that said apples were damaged while in defendant's possession as a result of defendant's negligence.

Refused. W. M. Morning, Judge.

Instruction No. 3*a*.

You are instructed that the defendant is not an insurer of the safety of a shipment of apples against damage by freezing, but is liable only for negligence in failing to take such precautions to prevent damage by freezing as a reasonable, prudent, person would use in like circumstances.

Refused. W. M. Morning, Judge.

Instruction No. 3*b*.

If you find from the evidence that the usual and ordinary methods of transporting perishable freight such as apples during the winter season is to transport them in a refrigerator car, and when weather conditions demand it, to heat said car with a heating stove, and if you further find that the defendant did transport the shipment in question between Omaha and Lincoln in a proper refrigerator car and that it provided for said car a proper heater as soon as it reasonably could after the weather became dangerously cold, then you are not at liberty to find the defendant negligent from the mere fact that said apples may have been frozen in transit.

Instruction No. 3*c*.

If you believe from the evidence that the apples in controversy were frozen before being loaded, then you will not allow any damages for such apples so frozen.

Refused. W. M. Morning, Judge.

24 Instruction No. 3*d*.

If you believe from the evidence that the damage in question, or any of it, occurred after the shipment was delivered to the plaintiff at Lincoln, Nebraska, then you will not allow anything for the damages so occurring.

Refused. W. M. Morning, Judge.

Instruction No. 3*e*.

It appears from the evidence in this case that at the time of receiving the apples in controversy, at Omaha, Nebraska, from the shipper, the defendant issued its bill of lading on which there was endorsed the notation that the shipment was received at the risk of the shipper so far as damage by freezing was concerned. You are instructed that the defendant had a right to protect itself against unavoidable damage by freezing and if you find from the evidence that the shipment was frozen notwithstanding proper care on the part of the defendant to prevent such freezing while in its possession, then your verdict will be for the defendant.

Refused. W. M. Morning, Judge.

Instruction No. 4.

You are instructed that you are not at liberty to consider any evidence which has been offered or given in this case, concerning the condition of any of the shipments subsequent to their delivery to the plaintiff at Lincoln, Nebraska. The evidence would indicate that some of the shipments were re-shipped to another locality after being delivered to the plaintiff at Lincoln, Nebraska. The condition of the shipment after such a reshipment is immaterial and will not be considered by you.

Refused. W. M. Morning, Judge.

Endorsed: 60-292. C. C. Whitnack, Produce Co., Plaintiff, vs. Chicago, Northwestern Railway Co., etc., Defendant. 9 Instructions Requested by Defendant and Refused. Clerk's office, District Court, Lancaster county, Nebraska. Filed Feb. 16, 1918. J. S. Baer, Clerk Dist. Court.

25 *Journal Entry.*

That on the 18th day of February A. D. 1918 (that being the 15th Judicial Day of the January A. D. 1918 term of said court) were had and done the following proceedings as appear upon Court Journal "74" at page 27 to-wit:

60-292.

WHITNACK PRODUCE COMPANY

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Now on this day again come the parties hereto with their attorneys and come also the jury heretofore impaneled and sworn herein, with their sealed verdict in writing, signed by their Foreman, and say:

"THE STATE OF NEBRASKA,
Lancaster County, ss:

January Term, A. D. 1918, to wit, February 16, 1918.

C. C. WHITNACK PRODUCE COMPANY, a Co-partnership, Consisting of C. C. Whitnack and John T. Lyle, Copartners, Doing Business under the Firm Name and Style of C. C. Whitnack Produce Company, Plaintiffs,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Defendant.

Verdict & Judgment.

We, the Jury, duly empaneled and sworn in the above entitled cause, do find for the plaintiffs and assess the amount of their damages against the defendant in the sum of $452.00.

I. G. CHAPIN,
Foreman."

Thereupon it is by the Court ordered that the said jury be and they hereby are excused from further consideration of this case.

It is therefore considered, ordered and adjudged by the Court, that, in accordance with the verdict of the jury herein, the plaintiffs, C. C. Whitnack Produce Company, a co-partnership, consisting of C. C. Whitnack and John T. Lyell, co-partners, doing business under the firm name and style of C. C. Whitnack Produce Com-
26 pany, do have and recover of and from the defendant, Chicago & Northwestern Railway Company, a corporation, the said sum of Four Hundred Fifty Two ($452.00) Dollars, damages assessed by the jury herein, together with the costs in this action, taxed at $—, for which execution is hereby awarded.

Motion for New Trial.

In the District Court of Lancaster County, Nebraska.

C. C. WHITNACK et al., Plaintiffs,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Defendant.

Comes now the defendant and moves the court that the verdict of the jury returned herein be vacated, set aside and held for naught, and a new trial granted herein for the following reasons.

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to the evidence and contrary to law.
3. The verdict is excessive.
4. The court erred in refusing to direct a verdict for the defendant in accordance with defendant's motion made at the close of the testimony.
5. The court erred in refusing to accord to defendant immunity from liability under the laws of the United States, and the common law as applied by federal courts, and especially in refusing to hold that there is no presumption that the loss occurred on the lines of the last carrier.
6. Errors of law occuring at the trial, to which defendant at the time excepted.
7. The court erred in refusing to permit defendant to
27 prove the admissions against interest, which were made by the shipper as to weather conditions immediately after the shipments left loading point.
8. The court erred in refusing to give to the jury instruction No. 1 requested by defendant.
9. The court erred in refusing to give to the jury instruction No. 2 requested by defendant.
10. The court erred in refusing to give to the jury instruction No. 3 requested by defendant.
11. The court erred in refusing to give to the jury instruction No. 3*a* requested by defendant.
12. The court erred in refusing to give to the jury instruction No. 3*b* requested by defendant.
13. The court erred in refusing to give to the jury instruction No. 3*c* requested by defendant.
14. The court erred in refusing to give to the jury instruction No. 3*d* requested by defendant.
15. The court erred in refusing to give to the jury instruction No. 3*e* requested by defendant.
16. The court erred in refusing to give to the jury instruction No. 4 requested by defendant.
17. The court erred in giving to the jury instruction No. 1 on its own motion.
18. The court erred in giving to the jury instruction No. 2 on its own motion.

19. The court erred in giving to the jury instruction No. 3 on its own motion.

20. The court erred in giving to the jury instruction No. 4 on its own motion.

21. The court erred in giving to the jury instruction No. 5 on its own motion.

22. The court erred in giving to the jury instruction No. 6 on its own motion.

28 23. The court erred in giving to the jury instruction No. 6½ on its own motion.

24. The court erred in giving to the jury instruction No. 7 on its own motion.

25. The court erred in giving to the jury instruction No. 8 on its own motion.

26. The court erred in giving to the jury instruction No. 9 on its own motion.

27. The court erred in giving to the jury instruction No. 10 on its own motion.

28. The court erred in giving to the jury instruction No. 11 on its own motion.

29. The court erred in giving to the jury instruction No. 12 on its own motion.

CHICAGO & NORTH WESTERN
RAILWAY COMPANY,
WYMER DRESSLER,
Its Attorney.

Endorsed: 60–292. In Dist. Ct. Lancaster Co., Nebr. C. C. Whitnack, et al., Pl'fs, vs. C. & N. W. Ry. Co. Motion for new trial. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 18, 1918. J. S. Baer, Clerk Dist. Court.

Notice of Appeal.

In the District Court of Lancaster County, Nebraska.

C. C. WHITNACK PRODUCE COMPANY, a Copartnership, Consisting of Charles C. Whitnack and John T. Lyell, Copartners, Doing Business under the Firm Name and Style of C. C. Whitnack Produce Company, Plaintiff,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Notice is hereby given that the defendant will appeal to
29 the Supreme Court of Nebraska from the judgment heretofore entered against it in this cause.

F. M. HALL,
W. DRESSLER,
A. A. McLAUGHLIN,
Attorneys for Defendant.

Endorsed: 60–292. In the District Court of Lancaster County, Nebraska. C. C. Whitnack Produce Company, Plaintiff, vs. Chicago and North Western Railway Company, a corporation, Defendant. Notice of Appeal. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 23, 1918. J. S. Baer, Clerk Dist. Court.

Supersedeas Bond.

Know all men by these presents, that Chicago and North Western Railway Company as Principal, and National Surety Company, a corporation of New York, as Surety, are held and firmly bound unto C. C. Whitnack Produce Company, a co-partnership, consisting of Charles C. Whitnack and John T. Lyell, co-partners, in the penal sum of One Thousand and no/100 Dollars ($1,000.00), for the payment whereof well and truly to be made unto the said C. C. Whitnack Produce Company, a co-partnership, consisting of Charles C. Whitnack and John T. Lyell, co-partners, their successors and assigns, we bind ourselves jointly and severally, firmly by these presents.

Yet, upon the condition that, whereas on the 18th day of February, 1918, the said C. C. Whitnack Produce Company recovered a judgment against the Chicago and North Western Railway Company, in the District Court of Lancaster County, Nebraska, for Four Hundred Fifty-two and no/100 Dollars ($452.00) and costs of suit, and to reverse said judgment said Chicago and North Western Railway Company intends to appeal said cause to the Supreme Court of Nebraska.

Now therefore, if the said Railway Company shall prosecute said appeal according to law and shall pay said judgment, if the same may be affirmed by the Supreme Court either in whole or in part, then this obligation to be void, otherwise to remain in full force and effect.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
By A. A. McLAUGHLIN,
Its Attorney.

NATIONAL SURETY COMPANY,
By W. H. WHEELER,
Its Attorney in Fact.

[SEAL.]

The foregoing bond and the surety thereon are hereby approved this 23rd day of February, A. D. 1918.

J. S. BAER,
Clerk of the District Court.

[SEAL.]

Endorsed: 60–292. In the District Court of Lancaster County, Nebraska. C. C. Whitnack Produce Company, Plaintiff, vs. Chicago and North Western Railway Company, Defendant. Supersedeas Bond. Clerk's office, District Court, Lancaster County, Nebraska. Filed Feb. 23, 1918. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 11th day of March, A. D. 1918 (that being the 32nd Judicial Day of the January, A. D. 1918, term of said court), were had and done the following proceedings as appear upon Court Journal "74" at page 98, to-wit:

60-292.

C. C. WHITNACK et al.

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Ruling on Motion for New Trial.

This cause now comes on to be heard on the motion of the defendant to set aside the verdict of the jury heretofore returned and entered herein, and the judgment rendered thereon, and for a new trial of this cause, is submitted to the Court, on due consideration whereof, the Court doth overrule said motion, to which defendant excepts, and is hereby allowed forty days from the rising of court in which to settle bill of exceptions.

31 *Certificate.*

STATE OF NEBRASKA,
Lancaster County, ss:

I, J. S. Baer, Clerk District Court, Third Judicial District of Nebraska, within and for the County of Lancaster, do hereby certify that the above and foregoing is a true and correct Transcript of Amended Petition, Answer, Reply, Instructions given by the court, Instructions requested by the Defendant, Motion for New Trial, Notice of Appeal, Supersedeas Bond, with all endorsements thereon and of Empaneling Jury, Court Proceedings, Verdict and Judgment, Ruling on Motion for New Trial, filed in a cause in said court wherein C. C. Whitnack Produce Company, a co-partnership consisting of Charles C. Whitnack and John T. Lyle, co-partners doing business under the firm name and style of C. C. Whitnack Produce Company is Plaintiff and Chicago & Northwestern Railway Company, a corporation, is Defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as Clerk aforesaid.

I further certify that the Bill of Exceptions hereto attached is the original Bill of Exceptions filed in this office in the above entitled case.

Witness my hand and the seal of said court at Lincoln, this 25 day of March, A. D. 1918.

J. S. BAER,
Clerk District Court,
By W. C. BURCHAM,
Deputy.

Transc. Fee, $8.30.

[Endorsed:] 20643. Whitnack Produce Co. v. C. & N. W. R. Co. Transcript. Supreme Court of Nebraska. Filed May 3, 1918. H. C. Lindsay, Clerk.

a In the District Court, Third Judicial District of Nebr., in and for Lancaster County.

60–292.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RY. CO., Defendant.

Clerk's Office, District Court, Lancaster County, Nebraska. Filed Mar. 25, 1918. J. S. Baer, Clerk Dist. Court.

1 *Index.*

Plaintiff's witnesses.	Direct.	Cross.	Re-direct.	Re-cross.
G. W. Pickering	5	30	46	47
C. C. Whitnack	49	70	72	...
C. Mozer	74	76	...	...
J. T. Lyle	81	84	...	...
C. H. Dean	94	97	...	...
Ross R. Robinson	100	...	...	...
C. C. Whitnack (recalled)	101	103	...	...
Melvin Shaver (by deposition)	90	...	...	...
C. C. Whitnack (recalled)	181	184	185	186
Defendant's witnesses.				
Charles A. Snyder	86	87	89	89
C. C. Whitnack (recalled)	104	...	...	...
W. F. Connor (by deposition)	107	111	114	...
C. F. Bass "	115	120	122	122
Hugh W. Hale "	129	131	135	...
W. H. Little "	137	141	144	144
E. Pearson "	147	150	..	...
K. K. Hicks "	156	171	172	174
Ernest Hahn "	175	177	177	...
C. H. Dean	179	...	...	...

2 *Exhibits.*

Plaintiff's.	Identified.	Offered.	Found.
"A" Bill Lading	6	31	32
"B" Bill Lading	8	33	34
"C" Acct. Sales	23	26	28
"D" Bill Lading	61	65	66
"E" Deposition Shaver, etc.	90	90	90
Defendant's.			
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"1" Deposition Hugh W. Hale, etc.	129	129	129
"2" Letter (Weather Bureau)	152	152	153
"2-*a*" Envelope "	152	152	154
"3" Deposition K. K. Hicks, etc.	155	155	155

3 In the District Court of Lancaster County, State of Nebraska.

60–292.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Defendant.

Defendant's Bill of Exceptions.

Appearances:
For Plaintiff: Burkett, Wilson & Brown.
For Defendant: A. A. McLaughlin and Wymer Dressler.

Lincoln, Nebraska, M'ch 25th, 1918.

Received of the attorneys for the Defendant for examination and amendment, the within draft of a Bill of Exceptions.

BURKETT, WILSON & BROWN,
Attorneys for Plaintiff.

Lincoln, Nebraska, M'ch 25, 1918.

We herewith return the within Bill of Exceptions, heretofore submitted for examination and amendment, and propose no amendments thereto.

BURKETT, WILSON & BROWN,
Attorneys for Plaintiff.

4 Be it remembered, that at the January, A. D. 1918, Term of the District Court of Lancaster County, Nebraska, to-wit: February 14, 1918, that being one of the days of said term, the cause of C. C. Whitnack Produce Company vs. Chicago & Northwestern Railway Company, a corporation, came on for hearing before Hon-

orable W. M. Morning, Judge; and the plaintiff and the defendant each to maintain the issues on their respective parts, adduced testimony and offered evidence, and all of said evidence and testimony, all of the objections thereto, with the grounds therefor, all of the rulings of the court on such objections, together with all of the exceptions to such rulings made and taken at the time having been by the Defendant herein reduced to writing in this its Bill of Exceptions, and said Defendant having served the same upon the attorneys for the Plaintiff for examination and amendment, as required by law, said Defendant now prays the court before whom said cause was tried that said Bill of Exceptions may be now settled, allowed, signed, sealed and made a part of the record in said cause in said court.

5 *Direct Examination of G. W. Pickering.*

Mr. G. W. PICKERING, produced on behalf of the plaintiff, was duly sworn and testified as follows:

Examination-in-chief.

By Mr. Brown:

1 Q. Where do you live?
A. Lincoln.
2 Q. How long have you lived in Lincoln?
A. A little better than 20 years.
3 Q. What business have you been engaged in for the past few years?
A. Produce—buying and selling.
4 Q. What did that include?
A. Apples, potatoes and peaches.
5 Q. What business were you engaged in in the fall of 1914?
A. Buying apples.
6 Q. How long had you been engaged in the apple business prior to that time?
A. I commenced in the fall of 1913.
7 Q. What business had you been in prior to that?
A. The mercantile business.
8 Q. For whom had you worked in the fall of 1914?
A. The C. C. Whitnack Company.
9 Q. The plaintiff in this action?
A. Yes sir.
10 Q. Where did you work for them in that fall, in the fall of 1914, at what place?
A. I went to New York State to buy apples for him.
11 Q. At what places were you?
A. Ransomville and Youngstown.
6 12 Q. How long were you back in New York buying apples?
A. About two months.
13 Q. About how many did you purchase for Mr. Whitnack?

A. Something like 75 cars.
14 Q. What kind of apples did you purchase?
A. The variety do you mean?
15 Q. Yes, the varieties?
A. A number of different kinds, Greenings, Baldwins, Kings.
16 Q. Were there any Spies?
A. Yes sir.

Paper identified as plaintiffs exhibit "A."

17 Q. What did you do with the apples purchased at Ransomville and Youngstown, for the Whitnack Produce Company?
A. I loaded them into the cars.
18 Q. And shipped them?
A. Yes sir.
19 Q. Handing you plaintiff's exhibit "A," which refers to S. F. R. D. car #8546, I will ask you whether that is a bill of lading for one of the cars you purchased?
A. Yes sir.
20 Q. Then this bill of lading represented one of the cars of apples you purchased for the plaintiff in this action?
A. Yes sir.
21 Q. Where were these apples loaded?
A. At Ransomville, New York.
22 Q. And do you, — what kind of a car was that?
A. That was a freezer.
23 Q. A refrigerator?
A. Yes sir.
24 Q. How were the apples placed in it, in bulk, in barrels or in boxes?
A. In bulk.
25 Q. Now what variety of apples were placed in this car, do you know?
A. That car contained mostly Baldwins and Greenings.
26 Q. What grade of apples did it contain?
A. That car contained mostly the "A" grade of apples.
27 Q. What do you mean by "A" grade of apples?
A. The New York grades are "A"—"B" and "C"; "A" is the best, "B" is the seconds and "C" is practically the culls.
28 Q. Were you present at the time of purchasing and loading these various cars?
A. Yes sir.
29 Q. And saw them loaded?
A. Yes and helped load them.
30 Q. Do you know what the condition of the apples were so far as their solidity was concerned?
A. Good.
31 Q. What are the facts as to whether they were frozen or frosted in any way or manner?

Mr. Dressler: Objects unless confined to this particular car.
(Question withdrawn.)

32 Q. That is true,—what were the facts as to whether or not the apples contained in this particular car represented by the bill of lading marked exhibit "A" were in any way frosted or frozen?

Mr. Dressler: Objects as no foundation laid as to this particular car.

8 Court: You may answer if you know. Exception.

A. There was no frost about them.

33 Q. Who else, if anyone, did you have that had a hand in the loading of this particular car?

A. I had a man that helped me all the time.

34 Q. Do you remember who he was?

A. I think his name was Shafer; I don't remember his first name.

35 Q. Do you remember what business he was engaged in?

A. At that time he wasn't in any business, but he went into the mercantile business shortly afterwards.

Paper identified as plaintiff's exhibit "B."

36 Q. Referring again to exhibit "A," from what place was that car shipped, the one I asked you about?

A. Ransomville, New York.

37 Q. Handing you exhibit "B," I will ask you whether that bill of lading represents one of the cars of apples you purchased for the plaintiff?

A. Yes sir.

38 Q. Where was that loaded and shipped?

A. Youngstown, New York.

39 Q. What kind of apples did it contain?

A. Bulk apples.

40 Q. What grade?

A. "A" and "B."

41 Q. Do you know what variety of apples?

A. Baldwins, Spies and a few Greenings is my recollection of that car.

42 Q. Do you know where that car was shipped from?

A. From Youngstown, New York.

9 43 Q. Was you present at the time it was loaded?

A. Only one day; I was there; they were loading two days; the first day I wasn't there.

44 Q. To what extent did you see and observe the apples that were placed in this car at Youngstown?

A. I went over in the morning to Youngstown from Ransomville and examined the car, what they had in there, and then I was there while they loaded in,—oh 6, or 7 or 8 loads and finished up the car.

45 Q. You refer to loads, do you mean wagon loads?

A. Yes sir.

46 Q. About how many loads were in the car at the time you went there in the morning?

A. Oh I presume 5 or 6 or 7, loads.

47 Q. How were the apples in the car when you got there; what part was filled?

A. In the ends.
48 Q. Both ends?
A. Yes, in loading the car that way they nearly always filled the ends first.
49 Q. When this car was finally loaded how were the apples left in it, that is, how were they placed, what position did they occupy in the car?
A. When they finished the loading?
50 Q. Yes?
A. On each side of the door, the door being in the center, with a partition across the car so it leaves a space where a man can get into the car, probably 4 or 5 feet wide, so you can get in from either side.
51 Q. There was a space left open from one side door to the other about 4 feet wide?
A. Yes.
52 Q. And each end was filled with bulk apples?
A. Yes sir.
53 Q. About how deep were those apples in the car?
A. Well, I would say just about 5 feet deep, they come up to here on me. (Indicating.)

(Court:)

54 Q. About where, to your mouth?
A. Well, I would say five feet about.

(Mr. Brown:)

55 Q. What kind of a car was this?
A. A refrigerator.
56 Q. What was the condition of the weather so far as temperature was concerned at the time the car was being loaded at Youngstown?
A. Very good; very nice and warm.
57 Q. Was it freezing or below freezing or above freezing?
A. No, I didn't see any freezing weather there at all until long after the car was loaded; there had been no heavy frosts.
58 Q. Now what was the condition of the weather, so far as the temperature was concerned, when the car referred to as being loaded at the town of Ransomville?
A. Very nice and warm, no frost.
59 Q. What was the fact, Mr. Pickering, whether any frosted or frozen apples were placed in this car that was shipped from Youngstown?

Mr. Dressler: Objects for the reason that the witness has already stated that he was not present at the loading except one morning, he was not there until the second day at all.

(Question withdrawn.)

60 Q. Mr. Pickering, from what you saw and observed of the apples that you loaded in this car at Youngstown, New

York, were you able to know whether or not there was any frosted or frozen apples in that car, answer yes or no?

Mr. Dressler: Objects for the reason that the witness has already stated that he was not present at the loading except one morning, he was not there until the second day at all.
Overruled. Exception.

A. Yes sir.
61 Q. You may state whether or not there were any frosted or frozen apples in that car, at the time it was loaded at Youngstown?

Mr. Dressler: For the reason that the witness has not shown that he was present at all when the car was being loaded until the second day.

(Court:)

62 Q. Is that correct?
A. That is correct.

Court: You may answer if you know of your own knowledge.
Exception.

A. There was none whatever.
63 Q. And was that car turned over to the railroad in the same condition?

Mr. Dressler: Objects because no foundation whatever has been laid.
Sustained. Exception.

64 Q. Do you know whether or not this car was turned over to the railroad company in the same condition—with the apples in the same condition—they were in at the time the car was loaded?
A. They were.

12 Mr. Dressler: Moves to strike out the answer as not responsive.

(Court:)

65 Q. The question is, do you know?

A. I do.

Court: The former answer goes out, the last answer stands.
Exception.

(Mr. Brown:)

66 Q. What is the fact as to whether the apples were turned over to the railroad company, in the same condition that they were in when they were loaded in the car?

Mr. Dressler: Objects as no foundation laid, and the witness already having disqualified himself to answer that question.
Overruled. Exception.

A. I had the apples billed out when I was there right there that day.

Mr. Dressler: Moved to strike out the answer as not responsive at all.

Sustained. Exception.

(Question repeated:)

67 Q. What is the fact as to whether the apples were turned over to the railroad company, in the same condition that they were in, when they were loaded in the car?

Court: You may answer that. Exception.

A. They were.

68 Q. When were they turned over to the railroad company as compared with the time they were loaded?

A. The day I was there loading.

69 Q. Day you finished loading?

A. Yes sir.

70 Q. What railroad company were they turned over to?

13 A. Well sir, it is a little switch—— (Interrupted.)

71 Q. It was the initial carrier of course?

A. Yes sir.

72 Q. For whom were you buying those apples that were loaded in this car at Youngstown?

A. The C. C. Whitnack Produce Company.

73 Q. And I observe that they were billed by you in your name and were billed to you; did you have property rights in them?

A. No sir.

74 Q. They belonged at all times to the C. C. Whitnack Produce Company?

A. Yes sir.

75 Q. How far is Youngstown and Ransomville apart?

A. Well, I don't know as I know exactly, something about 8 or 9 miles.

76 Q. How long had you been in the neighborhood of those two towns prior to the loading of the car at Youngstown?

A. Close to two months.

77 Q. And how long had you been in this neighborhood prior to loading the car at Ransomville that you have already referred to?

A. The same time.

78 Q. Now do you know whether the car that you referred to as loaded at Ransomville was turned over to the railroad company with the apples in the same condition that they were in when you loaded them, answer that by yes or no?

A. Yes sir.

14 79 Q. What is the fact as to whether they were in the same condition?

A. They were turned in and loaded and the car billed out the same day they were taken in.

80 Q. Were they in the same condition when they were turned over to the railroad company and billed as they were when they were put in the car?

A. Yes sir.

81 Q. During the time you had been in the vacinity of these two towns, up to the time of the loading and billing out of these cars, had there been any weather that was cold enough to freeze or frost apples?

Mr. Dressler: Objects as calling for a conclusion of the witness, and I insist on the witness describing the weather conditions rather than giving his conclusions.

Overruled. Exception.

A. There had not been any.

(Court:)

82 Q. What was the temperature do you know?

A. Oh, I don't think it was below 40 and from that up to 60 and 80.

(Mr. Brown:)

83 Q. Did you ever see either of these cars later—afterwards?

A. Yes sir.

84 Q. Which one, or did you see both of them?

A. I seen them both.

85 Q. Where?

A. I saw the one from Youngstown here in Lincoln, and then I saw it at Dodge and Clarkson. And I saw the other one at Grand Island.

86 Q. Where did you see the car that was shipped from Youngstown in Lincoln, where was it?

A. On the Northwestern track up by the scales.

87 Q. Who was there at the time you saw it; who was there with you?

A. Mr. Whitnack.

88 Q. What is the fact as to whether or not you made any examination of the car at that time relative to the condition of the apples?

Mr. Dressler: Objects to that line of questions unless counsel restricts the facts, if witness is going to testify to different dates.

(Question withdrawn.)

89 Q. Do you know about what time it was you saw this car again in Lincoln that was loaded at Youngstown?

A. I can't tell you the exact date, but it was the latter part of November, 1914.

Court: Was that the time they arrived here?

Mr. Brown: Yes sir.

90 Q. Now what, if anything, did you do to make an examination of the apples when you saw this car in the yards of the Northwestern here in Lincoln?

Mr. Dressler: Objects to any testimony as to the condition of this car of apples at Lincoln other than on the day it arrived here.
(Question withdrawn.)

91 Q. Do you know when you saw this car of apples as compared with the date of its arrival here?
A. It was a few days afterwards, I can't tell you; I don't know.
16 92 Q. You don't know how long afterwards?
A. No sir, that is only hearsay.
93 Q. Was they in the custody of the railroad company yet at the time you saw them?

Mr. Dressler: Objects as calling for a conclusion and an opinion of the witness and it is a question of law.
Court: You had better let him tell where they were.
Mr. Wilson: He has done that; he said they were in the yards of the company near the scales.
Court: If they hadn't been taken off the car yet you might show that.

94 Q. Where were the apples when you saw them?
A. In the original car I shipped them in.
95 Q. Had any been removed?
A. I think they had started to sort them over and had done something with the,—I know there was some little,—something down with them right at the door and they stopped.
96 Q. About how many of the apples were in the car at the time you first saw it in the yards in Lincoln?
A. Well, I don't think there were but very few taken out, probably,—I don't fully believe more than five barrels, there might have been, but I don't think there was, I don't say,—well really they had been changed around so that it was hard to tell just what had been taken out.
97 Q. What was the condition of those apples when you saw them in the yards at Lincoln?

Mr. Dressler: Objects as incompetent, immaterial, irrelevant, as of any date except the date of their arrival in Lincoln.
Court: There may be other evidence connecting up the circumstances; overruled. Exception.

17 A. They were badly frozen.

The hour of adjournment having arrived a recess was taken until tomorrow (Friday), February 15th, 1918, at 9 o'clock.

9:00 A. M. Friday, February 15th, 1918, Court met pursuant to adjournment of yesterday, and trial resumed.

G. W. PICKERKING, a witness for the plaintiff, having been previously sworn herein, resumed the stand in chief and testified as follows:

Examination-in-chief.

By Mr. Brown:

98 Q. What car was that Mr. Pickering, the one loaded at Ransomville or at Younstown?

A. No, the one at Youngstown.

99 Q. Mr. Pickering, did you observe the condition of the vents and hatches on the refrigerator car that contained those apples that you saw at the Northwestern?

Mr. Dressler: Objects unless confined to the particular time.
Sustained. Exception.

100 Q. Did you observe the vents etc., at the time you saw these apples that you testified to in the car on the Northwestern here in Lincoln?

Mr. Dressler: Objects unless confined to the particular time.
Overruled. Exception.

18 A. They were closed at that time.

101 Q. Now you may describe to what extent the apples were frozen in the car; just describe how you found them?

Mr. Dressler: Objects because not confined to the time of the arrival of the apples.
Overruled. Exception.

A. Why the ends were frozen the worst, each end next to the ice box, and the sides were frozen in,—oh, probably ten inches to a foot, and the bottom was frozen.

102 Q. What about the top?

A. The top was frozen down to 15—18, maybe 20 to 24 inches in some places, it varied.

103 Q. Were the apples frozen in the center of the piles?

A. No, not in the center of the car.

104 Q. Did you later see the apples in this car?

A. Yes sir.

105 Q. Where?

A. At Dodge, Nebraska.

106 Q. Do you know when you saw them at Dodge, Nebraska?

A. That was about the 29th of November, I think.

107 Q. About how long after you saw them at Lincoln?

A. About a week,—about five days after they arrived here.

108 Q. Now what, if anything, did you have to do with these apples at Dodge?

A. I took this car up there to dispose of them, to sell it.

109 Q. Did you dispose of it?

A. I did.

110 Q. Did you observe the apples as they were taken out of the car there at Dodge?

19 A. Yes, I had all of the apples sorted.

111 Q. What was the condition of the apples in that car

at Dodge, in the center of the pile, as compared with those at the sides and top and bottom and ends?

Mr. Dressler: The defendant objects to any testimony concerning the condition of the car at Dodge, Nebraska, for the reason that the shipment sued on is under a bill of lading issued by the Niagara Gorge Railroad at Youngstown, New York, and under that bill of lading the destination was Lincoln, Nebraska, and any testimony as to any condition of the car at some other place than Lincoln, Nebraska, after another shipment was made is incompetent, immaterial, irrelevant.

(Question withdrawn.)

112 Q. Mr. Pickering, do you know whether there had been a change in the condition of the apples, so far as being frozen is concerned, when you saw them in Dodge, as compared with the time you had seen them in Lincoln?

A. No sir, there had been no change, that is, they hadn't frozen; the weather was turning warm.

113 Q. Now you may state what condition you found the apples in in the center of the pile when they were removed from the car at Dodge, Nebraska, as compared with their condition at the sides, ends, top and bottom?

Mr. Dressler: The defendant objects to any testimony concerning the condition of the car at Dodge, Nebraska, for the reason that the shipment sued on is under a bill of lading issued by the Niagara Gorge Railroad at Youngstown, New York, and under that bill of lading the destination was Lincoln, Nebraska, and any testimony as to any condition of the car at some other place than Lincoln, Nebraska, after another shipment was made, is incompetent, immaterial and irrelevant.

Court: Are you gentlemen agreed that the damages are from the time they would reach Lincoln?

Mr. Wilson: I think so.

Overruled. Exception.

A. The condition of the car at Dodge, in the center they were good and all right.

114 Q. They were not frozen?

A. They were not frozen.

115 Q. Now what was the condition of the apples as you took them out there, at the ends, center, top and bottom of the piles?

A. They were badly frozen, and we throwed them out of the car right out on the ground.

116 Q. Mr. Pickering, do you know what the fair and reasonable market value of the apples were in that Youngstown car at the time you saw them in Lincoln, Nebraska, if they had not been frozen and had been in the same state of preservation they would have been when they were loaded on the car, answer by yes or no?

A. Yes sir.

117 Q. Now you may state what was the fair and reasonable market value of the apples in that car at the time they arrived at

Lincoln, Nebraska, if they had been in the same condition of preservation they were at the time they were loaded at Youngstown?

Mr. Dressler: The defendant objects to any testimony as to the market value of the apples at Lincoln for the reason that under the bill of lading issued by the initial carrier of this shipment at
21 Youngstown, New York, it is provided:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

Said bill of lading being issued on November 10, 1914, and any other evidence of value is incompetent, and unlawful under the terms of the bill of lading.

Mr. Brown: I want to ask another question before this is ruled on.
Court: Proceed.

118 Q. Mr. Pickering, I will ask you whether or not the regular freight rates contracted to be paid for the shipment of this car of apples, or whether there was any special rate given for the car?

Mr. Dressler: Objects for the reason that the rate under which the car would have to move would be that established by the published tariffs on file with the Interstate Commerce Commission, and any contract for any other rate would be null and void.
Court: Here is what I thought would be a good solution of the question: suppose you put in your evidence and I can take care of that by my instructions. I think I will let this in for the present; the objection is overruled. Exception.

(Question repeated:) 119 Q. Now you may state what was the fair and reasonable market value of the apples in that car at the time they arrived at Lincoln, Nebraska, if they had been in
22 the same condition of preservation they were in at the time they were loaded at Youngstown?
A. 75 cents a bushel.
120 Q. How many pounds to the bushel are there of apples, Mr. Pickering?
A. 48 pounds.

Court: What was the net weight?
Mr. Brown: That will show in the bill of lading.

121 Q. Do you know the net weight of the apples in the car?
A. No sir, I don't; something like 30,000 pounds, the exact net weight is in the bill of lading in each car.

122 Q. Do you know what the value of the apples were in this car at the time you saw them in the yards at Lincoln, in the condition they were in at the time you saw them?

Court: Answer that yes or no.

A. Well, I don't know how to answer that question; I am not posted on what frozen apples were worth in that condition, that is the trouble.

123 Q. Explain the reason you can't answer that yes or no?

A. Why the apples were so badly frozen it would be a question in my mind whether you could sell them at all for any price.

124 Q. I believe you stated that you disposed of those apples at Clarks, Nebraska?

A. Yes, part of them at Clarks.

125 Q. What was the condition of them, so far as being in condition to sell, at the time you disposed of them?

A. We had to sort them all over and pick out the good ones that were all right, that is, part of them were all right.

126 Q. Now did you sell them for the best price you could obtain for them at Clarks?

23 A. Yes sir.

127 Q. Do you know what you got out of them?

A. I got 75 cents a bushel.

128 Q. And how many did you sell—can you tell by referring to any memorandum?

A. Yes, I sent in a report.

Court:

129. Q. You sold all that were good?

A. Yes, I sold all that were fit to sell, I had to leave some at Clarks that were frozen so hard that I couldn't sell them.

Paper identified as plaintiff's exhibit "C."

130 Q. Mr. Pickering, calling your attention to exhibit "C" I will ask you whether you have seen that prior to this time?

A. I have.

131 Q. Do you know who made that out?

A. I made that out myself, most of it.

132 Q. What part of that exhibit is in your handwriting?

A. Not the purple ink.

133 Q. Then all of this exhibit "C" except the purple ink is in your handwriting?

A. Yes sir.

134 Q. I will ask you what this exhibit "C" represents?

A. An account of sales of the car at Dodge and Clarkson and the expenses.

135 Q. Is that a correct account of sales and of the money you received from this car of apples and the expenses in connection with it?

A. Yes sir.

136 Q. Now you may state what was the net amount that you were able to get out of that car after the expenses were paid?

Mr. Dressler: Objects as incompetent, and calling for a computation.
Sustained. Exception.

137 Q. Mr. Pickering, what was the total amount realized from this car of apples without deducting the expenses?

Mr. Dressler: Objects as incompetent, immaterial, irrelevant.
Overruled. Exception.

A. $201.95.

138 Q. Now you may state what were the items of expense in connection with the sale of the apples in that car?

Mr. Dressler: Objects because it is not the proper way of recovering damages, especially under the provisions of the bill of lading.
Overruled. Exception.

A. Well, there is an item of expense that isn't on this, the freight from New York to Lincoln isn't on here.

139 Q. You may go ahead and detail the other items of expense?

A. The expenses that I had was $51.93.

140 Q. What was that for?

A. That was freight from here to Dodge and Clarkson and sorting the apples, that doesn't include my expenses.

141 Q. That doesn't include your expenses?

A. No.

142 Q. Now how much was left from the total amount you got out of that car after the expenses were deducted that you have spoken of?

A. $150.02.

143 Q. And your expenses were not deducted?

A. No.

25 144 Q. Do you know what those were?

A. There is a report in here of my expenses, or should be, my expenses was $17.32.

145 Q. Then the amount you realized from that car would be $150.02 less the item of $17.32?

A. Yes sir.

146 Q. Please make the computation and state what that would be?

Court: I suppose Lincoln is the locality we have to deal with in figuring the damages; I suppose you were salvaging the goods there, and the question is whether or not so far under the evidence you are justified in shipping to Dodge and Clarkson and charging the expenses to the Company.
(Question withdrawn.)

147 Q. Mr. Pickering, before answering that question what was the purpose of shipping this car out of Lincoln, if you know?

Mr. Dressler: Objects as irrelevant, immaterial.
Overruled. Exception.

A. To try and dispose of it, it was impossible to dispose of them here.

148 Q. They couldn't be disposed of here?
A. No, they wouldn't have sold for $10 here I don't think.
149 Q. Now state what was the net amount you received from that car of apples after deducting your expenses?
A. After deducting the expenses it was $132.70.
150 Q. You are making no computation in that relative to the freight from New York to Lincoln?
A. No sir.

151 Q. Mr. Pickering, state the number of bushels of
26 apples you were able to sell out of that car?
A. I sold at Dodge 236 bushels @ 50 cents, $118, and I sold 121 bushels at 75 cents, $90.75; and I sold two loads of rotten frozen apples to a farmer there for $3.20 and left about 2 or 3 loads laying on the ground.
152 Q. That was the total amount you were able to sell out of the car?
A. That was all.

(Court:)

153 Q. Was that all that was salable?
A. Yes sir.
154 Q. Were these prices you got the highest market prices you could get for these apples?
A. Yes sir.

(Mr. Brown:)

155 Q. How were the sales made?
A. Right out of the car to the consumer, none sold to the retailers at all.
156 Q. What effort did you make to get the highest price for those apples?
A. Well, I advertised them around town that I was selling them out of the car to the consumer, and we sorted them.
157 Q. What is the fact whether you were able to sell to the merchants?
A. I couldn't sell them at all to the merchants.
158 Q. Mr. Pickering, the paper marked exhibit "C" when did you make out that paper, as compared to the time you sold the apples?
A. This was made out the evening we finished selling the apples at Clarkson.

Mr. Brown: The plaintiff offers exhibit "C" in evidence.
27 Mr. Dressler: Objects as incompetent.
Overruled. Exception.

Exhibit "C" received in evidence and is as follows:

28 PLAINTIFF'S EXHIBIT C.

Minor S. Bacon, Reporter.

Commercial Trade a Specialty. Refurnished Throughout.

The Noh Hotel.

F. A. Rozmarin, Prop.

Clarkson, Neb., ——, 191–.

Expense Sorting Car Apples:

J. J. Armstrong sorting at Lincoln	3.00
Tainey	7.75
Montgomery	3.75
Speworzo	1.00
Wormwood	1.25
Demur-age	1.00
Ft. to Clarkson	32.18
Paid Out Net Sales	49.93
Sold at Dodge 236 bu. @ 50c.	118.00
Sold Clarkson 121 @ 75	90.75
357	
Total Sales	$198.75
Sold Culls	3.20
	201.95
Less Ex. Pd.	49.93
	$152.02
Demurrage at Lincoln	2.00
Net receipts	$150.02

Exhibit 1-*b*. I. M. W.

28*a* Clarkson, Neb., ——, 191–.

Expense:		
11–30.	R. R. Scribner	1.54
	R. R. S to Clarksons	.56
	Hotel Din-er & Sup	1.00
	R. R. Scribner	.56
12– 1.	Lodging & Break.	1.00
	R. R. Dodge	.26
	Board 3 Days 1 Meal	6.50
	R. R. Scribner	.30
	Hotel Clarkson	2.50
	R. R. Scribner	.56
	Hotel " Sat. *Nite*	1.00
	R. R. Lincoln	1.54
		$17.32

132.70.

Exhibit. I. M. W.

28*b* Clarkson, Neb., ——, 191–.

I James Forney being duly sworn does state that he helped sort car 140156 L. S. & N. S. containing bulk apples and said car apples was badly frozen; that we sorted out of said car about 250 bushels and also states that the balance was in very bad condition and unsalable at full value and that he helped sell 236 bushels at 50¢ per bu. while they would readily sold and was worth not less than 75¢ per bu. and that he hired help to sort and the help was paid the sum of $13.75 for their services.

J. FORNEY.

Subscribed & sworn to before me this — day of *of* December, 1914.

—— ——.

Exhibit 1-*c*. I. M. W.

29 159 Q. Mr. Pickering, do you remember the price you paid for the apples at Youngstown, this particular car we have reference to?

A. No, I don't remember; we paid different prices from 50 to 65 cents a hundred.

160 Q. And what did you pay for the car at Ransomville, in the car that you referred to that was billed from there?

A. Well, I paid a little more for them than I did these they were a little better grade of apples, but it was within the scope per bushel of 50 to 65 cents; 50 cents was the lowest I paid for any in bulk and 65 cents was the highest.

161 Q. Didn't you pay 70 cents for a part of them?

Mr. Dressler: Objects as leading and suggestive.

Overruled. Exception.

A. No, I think not.

162 Q. Now this price you paid for them included the price you paid out for the apples but didn't include any expenses in the purchase, any of your expenses?

A. No sir.

163 Q. Mr. Pickering, did you see the other car of apples that was loaded at Ransomville, after they came to Lincoln?

A. Yes, after they came to Lincoln.

164 Q. Where?

A. At Grand Island.

165 Q. Oh, you didn't see them in Lincoln?

A. No, it was after they came here.

(Court:)

166 Q. They were reshipped from Lincoln to Grand Island?

A. I suppose they were; I billed them to either Omaho or Lincoln.

30 (Mr. Brown:)

167 Q. When did you see them in Grand Island?

A. I think about the 2nd day of December, 1914.

168 Q. What condition were those apples in when you saw them at Grand Island?

Mr. Dressler: Objects as wholly incompetent, the time referred to being after the car had been shipped over a different railroad and a long time after its arrival at Lincoln, and it is wholly irrelevant and immaterial.

Sustained. Exception.

169 Q. Mr. Pickering, when you referred to the price you paid from 50 to 65 cents per hundred, you mean per hundred pounds?

A. Yes sir.

(Court:)

170 Q. That was the market value back there?

A. Yes sir.

Cross-examination.

By Mr. Dressler:

171 Q. How long have you worked for the Whitnack Produce Company, Mr. Pickering?

A. I started with Mr. Whitnack in the fall of 1913.

172 Q. And how long since you have worked for Mr. Whitnack?

A. I worked for Mr. Whitnack up until December, 1916, and then I went to work for him again this last fall.

173 Q. Are you working for him now?

A. No sir.

174 Q. Did you work for them in 1915?

DISTRICT COURT LANCASTER COUNTY

FORM 24 C. WHCCo—10-06—100M

New York Central & Hudson River Railroad Co.

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

Shippers No. _____

Agents No. _____

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at _____ 190 ,

from _____ the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns

The surrender of the Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper.

The Rate of Freight from _____

to _____ *is in Cents per 100 Lbs.*

IF Timed 1st	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 28	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per	IF Special per .....

(Mail Address—Not for purposes of Delivery.)

Consigned to **ORDER OF** _____

Destination, _____ State of _____ County of _____

Notify _____

At _____ State of _____ County of _____

Route, _____ Car Initial _____ Car No. _____

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
	Buck apples	29 32	0	
	Stenciled Ventilation			
		PLAINTIFF EXHIBIT a	IBT	
		MINOR S. BACON		

295 2v @ 50¢
1 lg 90 # @ 10¢ extra
$ 14.69

RANSOMVILLE NOV 13,'14 N.Y. CENTRAL & H.R.R.R.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

_____ Shipper. _____ Agent.

Per _____ Per _____

32+

AGENTS MUST DETACH THIS SLIP BEFORE DELIVERY OF MEMORANDUM ACKNOWLEDGMENT TO SHIPPER.

This color and form of Me... must be used only fo... shi... consigned to "Order." In way-billing shipments ...ion the way-bill read... The surrender of the original Order Bill of Lading,

A. Yes sir.

175 Q. And in 1914?

31 A. Yes sir.

176 Q. And in 1913?

A. Yes sir.

177 Q. Mr. Pickering, handing you exhibit "A," I will ask you if this is your signature down here at the bottom of the shipping column?

A. Yes sir.

178 Q. And is that the original bill of lading?

A. That is.

179 Q. Or a duplicate of it at least?

A. That is the original.

180 Q. Made from Ransomville, New York?

A. Yes sir.

181 Q. That is the only bill of lading you got for the car?

A. That is the only one.

Mr. Dressler: The defendant now offers in evidence exhibit "A," as a part of the cross-examination of this witness.

No objection.

Exhibit "A" received and read in evidence and is as follows:

(Here follows bill of lading marked page 32.)

33 Paper identified as defendants exhibit "B."

182 Q. Referring to exhibit "B" for the car shipped from Youngstown is that the bill of lading which was issued by the initial carrier for that shipment?

A. Yes, that is the original bill of lading.

183 Q. Who is George B. Moore?

A. That is a man that used to live at Ransomville.

184 Q. This is his signature under your name on the bill of lading?

A. Yes sir.

185 Q. He billed that car out for you did he?

A. Yes sir.

186 Q. When did you go to Niagara County that fall to buy apples, in 1914?

A. I think it was about September, 15th.

187 Q. And how long did you stay there?

A. Well, I got home about November 25th, 26th, or 27th, right in there; I don't remember just the date.

Mr. Dressler: The defendant offers exhibit "B" in evidence at this time, as a part of the cross-examination of this witness.

No objection.

Exhibit "B" received and read in evidence and is as follows:

(Here follows bill of lading marked page 34.)

DISTRICT COURT LANCASTER COUNTY

The Niagara Gorge Railroad Co.

LESSEE THE LEWISTON AND YOUNGSTOWN FRONTIER RAILROAD CO.

Order

BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shippers No.

Agents No.

RECEIVED, Subject to the classifications and tariffs, in effect on the date of issue of this Original Bill of Lading.

at Youngstown Ny 11/10 1914.

from G W Pickering

1989 11/14

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees, to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is hereby agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from Youngstown Ny

to Lewiston is in Cents per 100 Lbs.

IF ... Times 1st	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per 02	IF Special per

Consigned to G W Pickering order Rolff (Mail Address—Not for purposes of Delivery) C C Whitcomb Lincoln Neb also J Alexander Omaha Neb

Destination Omaha State of Neb County of

Route C + A W Car Initial W P S Car No. 140 156

No. Packages	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	Weight (Subject to Correction)	Class or Rate	Check Column
	Bulk Apples	30130 lbs		
	L L + W			
	(Destd Opposite)			
	This car not to be delivered without surrender of orig BL properly Endorsed			

PLAINTIFF'S EXHIBIT B MINOR S. BACON REPORTER

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

G W Pickering Shipper. G. W. Robinson Agent.

34 Per Geo B Moore Per Ex A Agt

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

35 188 Q. Referring to this car loaded at Youngstown, New York, being M. D. T. 140156, when did you first see that car at Youngstown?

A. The date of it?

189 Q. Do you remember the date?

A. No I don't exactly.

190 Q. You don't remember what date it was?

A. No, I could tell by the bill of lading too.

191 Q. The bill of lading is dated November 10, 1914?

A. Well, it was November 10th then.

192 Q. That was the date it was shipped out?

A. Yes sir.

193 Q. That was the first time you saw the car was it?

A. Yes sir.

194 Q. You were not present when the car was actually billed out I assume?

A. Yes,—well I was sitting in the automobile and he says I am acquainted with the agent and I will run in and bill it out, and I gave him instructions and I waited until he came out of the office.

195 Q. Did you see that car at Youngstown any more than just the one day?

A. No sir.

196 Q. That was the last day of the loading?

A. Yes sir.

197 Q. And the loading consumed about 4 days?

A. No sir.

198 Q. How many days?

A. 2 days.

199 Q. How do you know?

36 A. Well, Mr. Moore told me they commenced the loading yesterday morning.

200 Q. And all you know about it is your recollection of what Mr. Moore told you?

A. Yes sir.

201 Q. And the loading was pretty well along when you saw it?

A. Probably in the neighborhood of half loaded.

202 Q. How had the weather been up to that time?

A. Very nice and warm.

203 Q. Where had you been before you went to Youngstown on the 10th of November?

A. At Ransomville.

204 Q. You had been there all the time?

A. Yes sir.

205 Q. You hadn't been to Youngstown before that day?

A. No sir.

206 Q. This was the only car that you bought at Youngstown wasn't it?

A. Yes sir.

207 Q. Now do you say you remember what you paid for the car Youngstown?

A. I don't remember the exact amount, as I stated before I paid from 50 to 65 cents per hundred in bulk.

208 Q. That would be a little less than 25 cents a bushel?
A. 50 cents—it would be a fraction less.
209 Q. Of course, these apples were being shipped in bulk?
A. They were.
210 Q. And the majority of apples grown in that county for shipping are shipped in barrels aren't they, the good apples are shipped in barrels?
37 A. No, I have shipped just as good apples in bulk as in barrels.
211 Q. What is the fact as to the practice there in that county, how do they handle their fruit?
A. Most of the buyers back there handle them in barrels, there is no other way to handle the market back there; they are not justified in shipping in bulk.
212 Q. Did you ship in bulk?
A. I shipped both ways: the market here demands both kinds.
213 Q. Did you make any report to Mr. Whitnack of the prices you paid for apples back there?
A. I did.
214 Q. At the time?
A. Yes sir.
215 Q. Now when did you next see this car of apples after the date it was billed out?
A. In Lincoln.
216 Q. You don't know what date that was?
A. I think it was about the 26th day of November, that is just about as near as I can tell.
217 Q. Have you anything for fixing in your mind the date?
A. No, only when I was at Dodge.
218 Q. You know the dates you were there?
A. Yes, I could figure that back and tell exactly.
219 Q. How far is it, about, from Youngstown to Chicago, by way of the New York Central Lines?
A. Oh, I presume about 500 miles.
220 Q. And about the same distance from Ransomville to Chicago?
A. Just about the same distance.
221 Q. About 10 or 12 miles across the country, between Youngstown and Ransomville?
38 A. I didn't think it was quite that far, I thought it was about 8 or 9 miles, but I don't say it is.
222 Q. How long were you there at Ransomville that fall buying apples?
A. Well, I was there, I left here on the 15th of September and I got back here, let's see, the 26th day of November.
223 Q. You spent most of your time there?
A. I was there all the time, except about 3 days just before I left there, that was after the apples had started.
224 Q. Did you buy your apples from the farmers around there?
A. Yes sir.
225 Q. You don't remember just what you paid there at Ransomville?

A. I paid, as I stated, from 50 to 65 cents a hundred in bulk.

226 Q. That is as near as you can fix it loaded in the car S. F. R. D. #8546?

A. That was a good car of stuff, probably I paid 55 to 65 cents for that.

227 Q. Your general recollection that 50 to 65 cents is as near as you can get at it is it?

A. Yes sir; I was buying from 10 or a dozen or 15 different farmers who were hauling to the place all the time and I paid according to the grades.

228 Q. You had a good many cars being loaded at the same time?

A. Yes sir.

229 Q. The farmers would bring the apples in and load them in the car would they?

A. They would bring them in, I had a man that helped me and we would put them in the car.

230 Q. Where would the farmers put them?

39 A. They would set them in the door in the boxes.

231 Q. In the car?

A. Yes.

232 Q. And you and your man would dump them in the car?

A. Yes, we carried them back and put them in the car.

233 Q. Did you have more than one man helping you?

A. Only a very little of the time, at first I had a man all the time.

234 Q. Some of the farmers dumped some of the boxes in too didn't they?

A. No, I don't know as a farmer ever dumped a box,—well he might have.

235 Q. Now the day you loaded this car S. F. R. D. #8546 at Ransomville you had several cars loading?

A. I attended to the loading, in good weather about 3 cars a day.

236 Q. And the farmers were hauling the apples from the orchards to these various cars all the time?

A. Yes sir.

237 Q. How many bushels of apples were there in this car from Youngstown, if you know?

A. I don't know now, only what the bill of lading calls for, the net weight was put on there.

238 Q. And do you know how many bushels of apples there were put in the car from Ransomville?

A. Nothing, only what the bill of lading calls for, the net weight.

239 Q. As I understand it you didn't see the car from Ransomville here at Lincoln?

A. No sir.

40 (Court:)

240 Q. I think you gave the market value of the apples at Lincoln, you gave it on the one car you saw here, was that per bushel or per hundred?

A. The market value on that car I saw here I said I didn't think would sell for $10.

241 Q. I mean if it had been in good condition, was it 75 cents per bushel?

A. Yes sir.

242 Q. You spoke of per hundredweight?

A. I bought them by the hundredweight, but out here everything is by the bushel.

(Mr. Dressler:)

243 Q. Now what had been the condition of the weather there at Ransomville, and in that vacinity, prior to the time you loaded these cars?

A. Warm and nice.

244 Q. Had there been a frost?

A. There might have been,—I think there was a little frost one morning,—just a trace of it.

245 Q. Was there any ice?

A. Not that I saw.

246 Q. Was there any snow?

A. Yes, I saw snow several afternoons.

247 Q. Prior to the time you made this shipment?

A. Yes sir.

248 Q. At that time the apples were on the trees were they?

A. Probably part of them were.

249 Q. And others were on the ground in the orchards?

A. Yes sir, and others were probably on the wagons, and the snow, there was just a little in the air, enough to say you saw snow, it didn't stay on the ground to make it wet, at the same time
41 the temperature wouldn't be within ten degrees of freezing, and it will frost you know at 36.

250 Q. In your work of buying apples at Ransomville did you make any report to Mr. Whitnack of the prices you paid?

A. Yes sir.

251 Q. In writing?

A. Yes sir.

252 Q. And he has those reports I suppose, has he?

A. I don't know whether he has or not, I never asked him.

253 Q. Have you read the depositions that were taken at Ransomville in this case?

A. No sir.

254 Q. Have you talked with anybody about that?

Mr. Brown: Objects as immaterial, and not proper cross-examination.

Sustained. Exception.

255 Q. Now referring to this Youngstown car which you saw at Lincoln, why did you say that it was practically of no value at Lincoln?

A. Well, I don't think you or anybody else would buy a car of apples that you thought that more than half were frozen.

256 Q. Was that the only reason you had?

A. I know that I wouldn't buy them at any price.

257 Q. Is that the reason you have in mind when you make the statement?

A. That is one of the reasons.

258 Q. You didn't offer to sell them to anybody?

A. No, I didn't offer to sell them to anyone.

259 Q. So you never made any effort to test whether or
42 not there was a market value for them in Lincoln?

A. No, I didn't go around to investigate and see what I could sell them for because they were in such shape——

260 Q. You didn't offer them to any of the merchants did you?

A. No, I didn't want to get in trouble.

261 Q. But you didn't make any attempt?

A. No, I wouldn't.

262 Q. Now you followed this Younstown car up after it got to Lincoln; it went to Scribner first, didn't it?

A. Well, it went through Scribner.

263 Q. Did you sell any apples at Scribner?

A. No sir.

264 Q. Where did you sell the first ones?

A. At Dodge.

265 Q. And you sold 121 bushels at Dodge was it?

A. No.

266 Q. Oh, 236 bushels at Dodge?

A. Yes sir.

267 Q. At 50 cents a bushel?

A. Yes sir.

268 Q. Did you offer them to any of the merchants?

A. No sir.

269 Q. You didn't try to sell them to the merchants?

A. I talked to the merchants and they said they didn't want them at all.

270 Q. They were full of apples?

A. No, they didn't say they were.

271 Q. You sold them out of the car?

A. Yes sir.

43 272 Q. You peddled them?

A. I thought I could get the best price for them out of the car and realize more money than any other way.

273 Q. Then you went on to Clarkson and sold 121 bushels?

A. Yes sir.

274 Q. At 75 cents a bushel?

A. Yes sir.

275 Q. And these are the same apples you paid approximately 25 cents per bushel for in New York?

A. Yes sir.

276 Q. So the ones that you sold at Dodge sold for 100 per cent of the cost price, if you sold them for 50 cents per bushel?

A. Well, that is what I sold them for.

277 Q. At Dodge you sold them at 200 per cent of the cost and at Clarkson at 300 per cent?

A. Well you could figure it, but that was without taking into account any expenses for the trip to New York and the expenses there and for the automobile.

278 Q. How many bushels of apples were there in these 2 loads that you sold for $3.20 a load?

A. Oh, I suppose there was 2 loads that sold for $3.20.

279 Q. How many bushels?

A. I suppose 140 to 150 bushels in the two loads.

(Court:)

280 Q. Wagon loads?

A. Yes sir.

Mr. Dressler:)

281 Q. How many bushels can you get in a wagon of apples?

A. Well when the frost come out they mashed right down close mashed.

44 282 Q. How many bushels can you get in a wagon?

A. That varies; I have seen them haul in New York 75 bushels.

283 Q. What kind of wagons were they hauled away in?

A. One man had a common farm wagon with two sides, sideboards on, and the other fellow had just one set of sideboards.

284 Q. Who did you sell these to

A. I don't know, I didn't ask the farmer's name.

285 Q. And then there were 2 or 3 loads left did you say?

A. I didn't measure them, I just saw them, we throwed them out of the car in a pile, there was quite a bunch of them.

286 Q. You don't really know how much loss there was in there, in bushels, do you?

A. Only what I took out, I took it from the bill of lading at the time what we had in, that is all the way I know.

287 Q. The other bushels you measured were those you sold out at so much per bushel?

A. Yes sir.

288 Q. Now what was the weather at Lincoln when you examined that Youngstown car?

A. It was mild.

289 Q. And what was the weather at Clarkson?

A. Mild and thawing.

290 Q. And at Dodge?

A. The same.

291 Q. All good weather?

A. Yes sir.

45 292 Q. The weather in this part of the country had been good for quite a spell hadn't it?

A. No, I think prior to that it had not been; I think they had quite a cold spell before I came home.

293 Q. That was several days before you came home?

A. 3 or 4 or 2 or 3 before I got here; there was quite a cold spell here.

294. Q. How much of an examination did you make of the car at Lincoln?

A. I got up in the car on the apples and went back to the back end next to the freezer—the ice box—you call it and dug down quite a ways, and dug down around the edges, and then dug down in the center, towards the center of the car.

295 Q. Was there frost on the apples?

A. Yes sir.

296 Q. At Lincoln?

A. Yes sir.

297 Q. White frost on the outside?

A. Yes, some on the outside and a good deal more on the inside.

298 Q. The white frost extended down into the load somewhat did it?

A. It extended around the edges on the outside.

299 Q. How far down in the load did the white frost extend?

A. Oh, I couldn't say, on top of the good apples, that it extended down very far, it was more on the out edge, the white frost would be.

300 Q. Well, how far in from the edge then?

A. Oh, I judge in the neighborhood of from 10 inches to a foot, somewhere along there.

46 301 Q. Of course, you didn't examine from the bottom up here at Lincoln?

A. No, I couldn't examine them very much, only right at the door.

302 Q. The apples wasn't unloaded at Lincoln?

A. No sir.

303 Q. There wasn't any of them unloaded?

A. I wouldn't say there wasn't any unloaded, I think they started to sort the car at Lincoln and stopped.

304 Q. Were any sold at Lincoln that you know of?

A. I wouldn't say there was or wasn't any; I don't know. I don't remember of asking that question, if there was there would have been but very few, probably not to exceed 4 or 5 bushels.

305 Q. If any were sold at Lincoln then you haven't given an account of it in your paper?

A. No sir, I know they started to sort them and stopped.

Redirect examination.

By Mr. Brown:

306 Q. Mr. Pickering, what was the fair and reasonable market value of the apples that was loaded at Ransomville in this S. F. R. D. car #8546, at Lincoln, Nebraska, at the time they arrived here if they had been in the same condition they were when they were loaded at Ransomville?

Mr. Dressler: The defendant objects to any testimony concerning the market value of the apples at Lincoln, Nebraska, for the
47 reason that the shipment was made pursuant to a bill of lading issued by the initial carrier, which is exhibit "A," and in that bill of lading it is provided:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

And for the further reason that the witness has already said that he didn't see the car at Lincoln.

Overruled. Exception.

A. I would say they were worth about 85 cents a bushel.

Recross-examination.

By Mr. Dressler:

307 Q. How long had you been away from Lincoln at the time the Ransomville car got here?

A. I don't quite catch you?

Q. How many months had you been away to the East and other places?

A. I went from here, as I stated before, the 15th of September.

Q. Then you don't know what the market value of apples in Lincoln was do you?

A. I did when I got back here, and I did, I think, pretty
48 well when I was there, I was posted every day as to the market value, yes.

310 Q. Is there any publication or any kind of sheet showing the market values?

A. Yes sir.

311 Q. Did you ever sell any apples here at any time shipped from that country?

A. Yes sir.

312 Q. What fall did you sell them?

A. I don't know whether I sold any that fall or not, I did the next year; and I got a telegram nearly every night, a night message as to how the market was. I had to know the market or I couldn't tell what to do back there at all.

Witness excused.

49 Mr. C. C. WHITNACK, produced on behalf of the plaintiff was duly sworn, and testified as follows:

Examination-in-chief.

By Mr. Brown:

313 Q. Mr. Whitnack, you are one of the partners of the plaintiff company here?

A. Yes sir.

314 Q. Who is the company composed of?

A. Myself and J. T. Lyle.

315 Q. How long have you been in the produce business handling apples?

A. 14 years this month.

316 Q. At what place?

A. Lincoln.

317 Q. During all of that time at Lincoln, Nebraska?

A. Yes sir.

318 Q. Do you remember of seeing the car M. D. T. 140,156 in the yards of the Northwestern Railway Company in November, 1914?

A. Yes sir.

319 Q. Do you know when you saw it as compared with the time it arrived?

A. I saw it the next day.

320 Q. When did you see it as compared with the time when you were notified of its arrival?

A. I saw it the same morning I was notified.

321 Q. That was the Ransomville car?

A. No sir, that was the Youngstown car.

322 Q. Who was present when you first saw the car; who
50 was with you if anyone?

A. I don't know as anyone was with me; I don't recall anybody being with me at the time I first inspected the car.

323 Q. Did you inspect the car or see the car later when there was anybody with you?

A. Yes sir.

324 Q. When was that as compared with the first time you saw it, the same day or the next day?

A. I think I saw that car several times the first day, and several times the second day.

325 Q. And who was with you when you saw it at other times the first day?

A. Well, I had a bunch of these peddlers over there trying to dispose of the car to them.

326 Q. What about the railroad agent, was he there?

A. The railroad agent wasn't in the city at that time, he was absent; I think he was in Wisconsin.

327 Q. Did he see that same car while it was in Lincoln?

A. He did not.

328 Q. Were you there when Mr. Pickering was there any time?

A. Yes sir.

329 Q. When did Mr. Pickering see the car as compared with the time it came in?

A. I think about the 3rd day after the car arrived in Lincoln.

330 Q. Now when you first saw that car what was its condition so far as vents and openings in the car were concerned?

51 A. When I saw the car the vents were closed and in proper condition.

331 Q. What was the condition of the apples?
A. The apples were very badly frozen, showing that the vents had been open while the car was in transit—— (Interrupted.)

Mr. Dressler: Moved to strike out the answer as a voluntary statement and a mere conclusion.
Mr. Brown: That may go out.

332 Q. Mr. Whitnack, was there anything relative to those apples that would indicate to you that the vents and openings had remained open during the cold weather?
A. Yes sir.
333 Q. You may state what that was?

Mr. Dressler: Objects as calling for hearsay testimony.
(Question withdrawn.)

334 Q. You may explain,—first how are those apples loaded in the car, how were they placed?
A. They were loaded in bulk level through from one end of the car to the other about 5½ feet deep.
335 Q. Was there any opening in the center?
A. There was a "V" shaped opening on either side in front of each side door.
336 Q. Now you may fully describe the condition of those apples where they were frozen when you first saw them, describe it fully?
A. The first frozen apples I saw were right by the door and I made a further examination and found that the apples was
52 frozen next to the ice bunkers and on the sides of the car.
337 Q. What about on top?
A. They wasn't so badly frozen on top, they were down about 2 or 3 layers deep on the top.
338 Q. What do you mean?
A. 2 or 3 layers of the apples when you got back next to the ends of the car they were frozen solid clear through as far down as you could dig.
339 Q. Whereabouts were the openings and vents, the openings on that car; where were they on that car?
A. Near the end, two on either end.
340 Q. They were near where the apples were frozen first?
A. Yes sir. These openings, when they are open the cold weather ventilates directly on the apples.

(Court:)

341 Q. If they are kept closed the air doesn't get in?
A. No sir, they have frost proof plugs that are put on before the vents were closed and these plugs would indicate that the hatch was open—— (Interrupted.)

Mr. Dressler: Moved to strike out the last part of the answer as not responsive.
Sustained. Exception.
Mr. Dressler: I object to the testimony on this subject for the

reason that the original bill of lading signed by the shipper's agent bore the instructions "Vents open," that doesn't mean vents open at destination.

Overruled. Exception.

(Mr. Brown:)

342 Q. Mr. Whitnack, are you familiar with the shipping
53 of apples in refrigerator cars, and familiar with how the vent openings are to be handled on refrigerator cars?

A. Yes sir.

343 Q. Now what is the fact as to whether or not the vents should be left in the same condition in a shipment say, from New York to Lincoln, or is that varied any by the condition of the weather?

Mr. Dressler: Objects as calling for a conclusion and calling for a legal opinion, the bill of lading on this car bore the express direction to leave the vents open.

Court: I don't know, it is probable that a man who is an expert, and who is accustomed to shipping and knows how a car should be handled, would be competent to state.

Mr. Brown: That is the purpose of the question.

Overruled. Exception.

A. Apples and potatoes moving in ventilation, that is, a car without ice must be ventilated when the weather is above freezing, otherwise those perishable commodities would heat, that is why the car was billed vents open.

Mr. Dressler: Moved to strike out the answer as not responsive.

Court: Sustained as to the last part of the answer. Exception.

344 Q. What is the purpose in leaving the vents open on one of those refrigerator cars?

A. In this particular case the shipper was acting under my instructions.

Court: That doesn't quite answer the question.

A. To ventilate the load.

54 345 Q. Now, if, during transit there would be a change in the weather and it became much colder, what would be the proper regulation of the vents?

Mr. Dressler: Objects as calling for a legal opinion as to the duty of the carrier and the rights of the respective parties, in view of the instructions which appear on the bill of lading for this car.

Court: You may show what was the ordinary and usual way to keep the vents.

Objection overruled. Exception.

A. The plugs should be put in and the vents closed, and the railroad company maintains a mechanical department to look after that.

(Court:)

346 Q. On the rule of perishable fruit when it is above freezing it needs ventilation and when it is below it needs protection?
A. Yes sir.

(Mr. Brown:)

347 Q. What instructions had you given your agent, Mr. Pickering, relative to the cars so far as vents were concerned?

Mr. Dressler: Objects as irrelevant, immaterial, and not binding on the carriers, the duties of the carriers being measured by the instructions which it actually received.
Sustained. Exception.

348 Q. This car L. F. M. S. #140,156 was originally billed to Omaha I believe?
A. Yes sir.
349 Q. What was done with it there?
A. It was diverted to Lincoln upon its arrival in Omaha.
350 Q. Under whose instructions?
55 A. Mine.

Court: That is the one from which place, Youngstown?
Mr. Brown: Yes sir.

351 Q. Do you know about when that car arrived in Lincoln?
A. Yes sir.
352 Q. When?
A. November 24th.
353 Q. Do you know what had been the condition of the weather prior to that?
A. Yes sir.
354 Q. What was it in Lincoln, Nebraska?
A. It had been down to 15 above zero on the 19th.

(Mr. Dressler:)

355 Q. The car wasn't here then?
A. No sir.

(Mr. Brown:)

356 Q. What was the fair and reasonable market value of those apples when you saw them in Lincoln if they had not been frozen?

Mr. Dressler: The defendant objects to any testimony as to the market value of the apples at Lincoln for the reason that under the bill of lading issued by the initial carrier of this shipment at Youngstown, New York, it is provided:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (Being the bona-fide invoice price, if any, to the consignee, including the

freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

Said bill of lading being issued on November 10, 1914, and
56 any other evidence of value is incompetent, and unlawful under the terms of the bill of lading.

Court: I thought that car was consigned to Lincoln, I have been going on that theory.

Mr. Brown: It was consigned to Omaha and diverted.

Mr. Dressler: It was consigned as much to Lincoln as to Omaha, it reads: "Consigned to G. W. Pickering, order, notify C. C. Whitnack, Lincoln, Neb., also J. Alexander, Omaha, Neb." The car went to Omaha anyway, no matter where it was shipped to.

Overruled. Exception.

A. 80 cents a bushel.

357 Q. What was done with this car after you saw it in Lincoln?

A. After I convinced myself that I couldn't sell it in Lincoln I hired some men and put them to work sorting the apples.

358 Q. Here in Lincoln?

A. Yes, I found we weren't going to get enough good apples out of them to pay for sorting the apples as the apples we supposed were good weren't in a merchantable condition to sell to the merchants and I saw that the only thing we could do would be to sell them out to the consumers and we had a prospect at Dodge and sent the car up there.

359 Q. How many, if any, were taken out of the car and sold here at Lincoln?

A. None were sold, but probably 10 or 12 bushels of frozen apples were taken out.

360 Q. No good apples were sold here?

57 A. No good apples were taken out and none were sold.

361 Q. Now did you see the Ransomville car S. F. R. D. #8546, in Lincoln after its arrival?

A. Yes sir.

362 Q. When did you see it as compared with its arrival?

A. The next morning.

363 Q. When did you see it as compared to the time you were notified of its arrival?

A. The same morning.

364 Q. Who was with you when you saw that car on the first morning?

A. Mr. Dean, the agent for the Northwestern.

365 Q. Do you know about when that was?

A. That was on the 20th of November.

366 Q. 1914?

A. Yes sir.

367 Q. Now what was the condition of the apples in that car when you first saw them?

A. They were, we thought, only slightly frozen but we went back and took another look at them in the afternoon and the frost was coming out, the apples were wet with frost.

368 Q. They were wet with frost when you first saw them?

A. No, they were frozen and no frost apparent on the apples.

369 Q. And later as the frost came out it would show?

A. The weather moderated immediately after the car arrived and we opened the door and let the warm air in and the frost came out just like it was snowed on.

370 Q. About what was the temperature when they arrived?

A. About zero.

58 371 Q. What was the condition of those apples so far as freezing is concerned, in one part of the car as compared with other parts?

A. We found they were frozen more in the ends than on the sides or middle.

372 Q. How about the top was that frozen?

A. That was frozen too.

373 Q. What part of the car were they frozen the greatest in?

A. The bottom and the ends.

374 Q. What was done with that car?

A. We allowed the car to stay here in Lincoln for about ten days for the frost to draw out gradually and finally sold the car to a huskster from Grand Island.

375 Q. Were you able to sell it here in Lincoln?

A. No sir.

376 Q. Do you know what you received for the car?

A. Yes sir.

377 Q. How much?

Mr. Dressler: Objects as irrelevant and immaterial.

Overruled. Exception.

A. We got the net amount of $165.

(Mr. Dressler:)

378 Q. That is at Grand Island?

A. That is what we finally got out of the car.

379 Q. At Grand Island?

A. Yes sir.

(Mr. Brown:)

380 Q. Do you know what the net weight of this car was?

A. Just a minute, I don't mean that we received this $165, at Grand Island, that was the net amount after the apples were disposed of.

59 381 Q. You may explain where you got the $165?

A. $65 the Union Pacific paid us for some apples stolen out of the car between Lincoln and Grand Island, the remainder were sold for $100. net.

382 Q. The car was shipped from Lincoln to Grand Island over the Union Pacific?
A. Yes sir.
383 Q. Do you know,—you say the net amount you got was $165?
A. Yes sir.
384 Q. Is that after deducting some expenses?
A. No sir, that represents what the apples were sold for.
385 Q. You sold the car in bulk to the huckster?
A. Yes, I first sold the car at so much per hundred and the huckster found that they were so badly frozen that he refused to have anything to do with them and he hadn't paid me anything so I had to send Mr. Lyle up there, and he succeeded in getting a sucker up there to unload them for $100.
386 Q. He simply paid $100. for it?
A. Yes sir.
387 Q. And you received $65. in addition from the Union Pacific for apples that had been taken out of the car?
A. Yes.
388 Q. Who paid the freight from Lincoln to Grand Island?
A. I did.
389 Q. Did you get the $100. above the freight or was the freight to be deducted?
A. The freight was to be deducted.
390 Q. Do you know how much the freight was?
60 A. Only approximately, I know the rate was 12½¢ per hundred.
391 Q. Have you any way of determining just the amount of that freight, or would you have it at the office?
A. I don't believe we have it at the office: I think the original freight bill was filed for that claim.

Mr. Dressler: All of this is objected to as irrelevant and immaterial, for freight paid on a new shipment.
Court: What is you- theory, Mr. Brown?
Mr. Brown: On the theory of salvaging the shipment and trying to get out what represents net to them so as to give you credit for it.
Overruled. Exception.

392 Q. Do you know the weight, the net weight of this S. F. R. D. car?
A. Not without referring to my memoranda.

(Mr. Wilson:)

393 Q. The bill of lading is in evidnce and that states it does it not?
A. Yes sir.

(Mr. Brown:)

394 Q. Is that the car you refer to S. F. R. D. #8546, (Handing witness paper). Is this bill of lading marked exhibit "A" which

shows the weight 29,520 pounds, is that this car you refer to now that was shipped to Grand Island?

A. I think that is 29,320—— (Interrupted.)

Mr. Dressler: I object to any attempt, or any evidence to prove the amount of apples in either of the cars from New York, by showing the weight mentioned in the bill of lading, for the reason that the weight mentioned in the bill of lading under the terms of the bill of lading is incompetent, and is no evidence of the weight shipped.

Overruled. Exception.

61 A. Yes sir.

395 Q. Mr. Whitnack, I don't know whether I asked you about the condition of the vents on the S. F. R. D. car, when you first saw it in Lincoln, you may state what they were?

A. They were open.

396 Q. And what was the temperature about that time?

A. About Zero.

397 Q. Now referring to C. & N. W. car #14466, I will ask you where that car was shipped from?

A. That was shipped from Omaha.

398 Q. Over the Northwestern?

A. Yes sir.

399 Q. And where was it shipped to?

A. To Lincoln.

400 Q. About when did it arrive at Lincoln?

A. Well, I think about 3 or 4 days after the date of shipment at Omaha, I don't remember the dates.

Mr. Dressler: I will agree with you on that.

401 Q. Have you got the bill of lading with you?

A. Yes sir.

Bill of lading identified as plaintiffs exhibit "D."

402 Q. Handing you plaintiffs exhibit "D" I will ask you whether this is the bill of lading obtained from the railroad for the shipment of C. & N. W. car #14466 from Omaha to Lincoln, Nebraska?

A. Yes sir.

403 Q. Now did you see that car after its arrival here in Lincoln?

A. Yes sir.

404 Q. About how soon after its arrival?

62 A. The same day.

405 Q. Did you observe the condition of the apples?

A. Yes sir.

406 Q. What was the condition of the apples?

A. The apples were mostly in boxes,—350 barrels and 408 boxes; the boxes were worse frozen than the barrels.

407 Q. What was done with those apples?

A. They were unloaded at Lincoln.

408 Q. What was done after they were unloaded?

A. We made arrangements with I. B. Robinson to sort the apples and sell them for us.

409 Q. What was the value of those apples in this car at the time they arrived in Lincoln if they had not been frozen, and if they had been in the same condition they were in when they were loaded at Omaha?

Mr. Dressler: I object as incompetent, because the condition has not been shown yet.

Mr. Brown: That is true, our witness is not here yet on that.

(Mr. Brown:)

410 Q. I will change the question and put it this way. What was the value of those apples in this car at the time they arrived in Lincoln assuming that they were not frozen and assuming them to be in the same condition they were in when they were loaded at Omaha?

(Mr. Dressler:)

Q. 411. That was months before wasn't it?

A. Yes sir.

Mr. Dressler: Objects as incompetent and because the condition has not been shown.

Overruled. Exception.

63 A. I saw the apples in Omaha, I put the apples in storage. The value would be determined by the varieties of the apples, there was several varieties.

412 Q. What varieties were they?

A. There were some Winesaps, New Town Pip-ins, some Ganows, and some Jonathans, the principal varieties were Winesaps and New Town Pippins; the New Town Pippins was the most expensive @ $2.50; The Winesaps @ $2.00, and the others at $1.75.

413 Q. Do you know how many Pippins there were?

A. No, I don't; I haven't any memorandum of the number.

414 Q. Have you any memoranda at the office to know how many there were of each?

A. I have nothing here to show, the claim isn't based on what the apples were worth, it is based on what they cost.

415 Q. Do you know approximately how many apples there were of each variety?

A. No, I don't.

416 Q. Which variety was of the lowest value?

A. The Ganows.

417 Q. And about what was the reasonable value of the Ganows per box in Lincoln at the time they arrived here if they had not been frozen?

A. $1.75 per box.

418 Q. And there were 450 boxes of apples all told?

A. No, 408.

419 Q. And what kind of apples were in the barrels?
A. Ganows.
420 Q. And what was the fair and reasonable market value of the Ganow apples at the time they arrived here in Lincoln if
64 they had not been frozen?
A. $4.50 per barrel.
421 Q. Now do you know how much you were able to realize out of that car of apples?

Mr. Dressler: Objects as irrelevant and immaterial.
Overruled. Exception.

A. I have a record of what we realized out of that car at the office but our claim was not based on what we sold them for, but it is based on the record of the number of frozen apples.
422 Q. How many frozen apples were there in this car?
A. There were 28 barrels.
423 Q. 28 barrels of the Ganows?
A. No, the boxes were mostly frozen but the frozen apples were put in 28 barrels and there was 28 barrels of this refuse when they were sorted.
424 Q. Then what would that make it where there were 28 barrels less apples in the car after they were sorted?
A. It takes 3 boxes to make a barrel and we had 28 barrels of these refuse apples that came mostly out of the boxes because the barrels didn't freeze, the barrels were more protection to the apples.
425 Q. Then what were the apples which were frozen, how many less boxes?
A. About 84 boxes less.
426 Q. And the lowest value of the apples in the boxes were $1.75 per box?
A. Yes sir. The prices ranged from $1.75 up to $2.00 and $2.50 for the fancy apples.
427 Q. Now do you know what was the reasonable market
65 value of those apples in Omaha immediately before they were shipped?
A. Practically the same as Lincoln; the Lincoln market and the Omaha market ranges about the same.
428 Q. Do you know what the freight is from Omaha to Lincoln?
A. About 8½¢ per hundred.
429 Q. And about how many hundredweight was there in this car?

(Question withdrawn.)

430 Q. How heavy is a box of apples?
A. It is supposed to weigh gross 50 pounds to the box of apples.
431 Q. And how heavy is a barrel of apples?
A. It ranges from 150 to 160 pounds gross.
432 Q. I wish you would make a computation on that basis and state how many pounds of apples there were in the car?

Mr. Dressler: This bill of lading shows the weight of the barrels and boxes, so far as that car is concerned, you may use this.

DISTRICT COURT LANCASTER COUNTY

DISTRICT COURT LANCASTER COUNTY

Third J dial ict

W. M. MORNING, Judge — Lincoln, Nebraska — MINOR S. BACON, Reporter

FORM 35-C

This Company does not accept for transportation Money, Gold, Silverware, Valuable Papers or Paintings nor any articles of extraordinary value unless special arrangements are made

CHICAGO & NORTH WESTERN RAILWAY COMPANY

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shipper's No._____

Agent's No._____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

AT Omaha Neb 2/21 19 14.

FROM C. Wood the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which the CHICAGO & NORTH WESTERN RAILWAY COMPANY agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

All car load freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each 24 hours' detention or fractional part thereof after the expiration of 48 hours from its arrival at destination.

The Rate of Freight from_____

to_____ is in Cents per 100 Lbs.

IF.....Times 1st Class	IF 1st Class	IF 2nd Class	IF 3rd Class	IF 4th Class	IF 5th Class	IF Class A	IF Class B	IF Class C	IF Class D	IF Class E	IF Special per_____	IF Special per_____

(Mail Address—Not for purposes of Delivery.)

Consigned to C. B. Schmucker Bro Co

Destination, Lincoln State of Neb County of

Route, Car Initial C. N. W. Car No. 14466

No. Packages	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
408	Boxes Apples CLAIM DEPARTMENT	14400 #		
50	Bbls Apples 5474756750 #			
	R.T. C.&N.W.RY.			
	$1.56			
	Heat under Refrigeration			
	Do not Ice or Ventilate			

PLAINTIFF'S EXHIBIT D MINOR S. BACON REPORTER

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent

Per (The signature her only the amount prepa

Charges Advanced:

$

C. Mogel Shipper

Per

W. J. Smith Ag

Per

(This Bill of Lading is to be signed by the Shipper and Agent of the C. & N. W. Ry. Co.)

66 X

A. These weights are only approximate because the barrels and boxes are not weighed before loading.

Mr. Brown: The plaintiff offers in evidence exhibit "D."
No objection.
Exhibit "D" received and read in evidence and is as follows:

(Here follows bill of lading marked page 66.)

67 433 Q. Mr. Whitnack, did you ever file a claim with the Northwestern Railroad for this car, C. & N. W. #14,466?

A. Yes sir.

434 Q. About when did you file it with them?

A. Well, I filed it inside of the next 4 months anyway.

435 Q. And for what amount, if you know, have you any memoranda that will assist you in that?

A. Yes, I have an invo-ce here, I have an invoice when I filed the claim for $127.75.

436 Q. And have you ever filed a claim with the defendant here for damages for the L. S. M. S. car #140,156?

A. Yes sir.

437 Q. About when did you file that?

A. Well, we have a limit of four months after the date of shipment; I am sure this claim was filed within that 4 months, although I don't remember the date.

438 Q. Do you know the amount for which that claim was filed?

A. I have a record of it in my pocket.

439 Q. Examine it and state the amount?

A. I will have to back up on that; I haven't got the record of what I filed or for the amount of the claim.

440 Q. Do you know whether it is the same amount we ask for in the petition?

A. Yes, it is the same amount.

441 Q. And did you file any claim with the Northwestern Railroad for this car S. F. R. D. #8546?

A. Yes sir.

442 Q. When was that filed?

A. It was filed at the same time as this last claim you spoke of.

443 Q. And within the 4 months?

68 A. Yes sir.

444 Q. And is that for the same amount as is asked for in the petition?

A. Yes sir.

445 Q. Did the railroad company pay you anything on any of those claims?

A. No sir.

446 Q. Mr. Whitnack, what varieties of apples were in those two cars, one from Youngstown and the other from the other place in New York?

A. The one from—in this S. F. R. D. car #8546 was nearly all Baldwins, in fact that is all I saw in the car at Lincoln, as far as I know, the car was straight Baldwins.

447 Q. What about the other car?

A. The other car had Baldwins, Northern Spies and a few Greenings, but principally Baldwins.

448 Q. Mr. Whitnack, do you know what was paid for the two cars in question, shipped from New York?

A. I don't now; I filed the original invoices with my claim on the railroad company.

449 Q. Were these original claims you have referred to based on the cost price in New York?

A. No sir.

(Court:)

450 Q. That is, the two New York shipments?
A. The claims covering the two New York shipments was based on the sales at this end, at the same time I filed the invoices of Mr. Pickering showing what the apples cost.
451 Q. And their cost was based upon the Nebraska market Omaha and Lincoln?
A. Yes sir.

69 (Mr. Brown:)

452 Q. Would your books show what you paid for the apples in New York per hundredweight?
A. Yes sir.
453 Q. That went into these particular cars?
A. Yes sir.
454 Q. You can obtain that at noon can you?
A. Yes sir.
455 Q. Do you know what the freight rate is from those points in New York to Lincoln is?

Mr. Dressler: Objects because the only competent evidence of the freight rate is certified extracts of applicable tariffs certified under seal of the Interstate Commerce Commission.
(Question withdrawn.)

456 Q. Will your books show how much freight you paid?
A. Yes sir.
457 Q. You may also look that up so as to tell us after dinner?
A. Yes sir, but the paid freight bill should be with the claim filed, for what I filed with the claim; I have got the paid freight bill on the Omaha car right here.
458 Q. How much is that Mr. Whitnack?
A. The rate is .10175¢ per hundred weight.
459 Q. What do you mean by .10175¢?
A. 10¢ and 175 thousandths of a cent per hundred weight.

(Court:)

460 Q. What did you pay out in dollars?
A. $29.20.

Mr. Brown: You may cross-examine subject to what he is to bring in after dinner.

70 Cross-examination.

By Mr. Dressler:

461 Q. Referring to exhibit "D" which is the Omaha to Lincoln bill of lading, and inviting your attention to the notation on that bill of lading "O. R. F." do you know what that means?
A. I do.

462 Q. What does that mean?
A. Owners Risk Freezing.
463 Q. And the notation "S. L. & C." do you know what that means?
A. Yes sir.
464 Q. What does it mean?
A. Shippers Load and Count.
465 Q. It means the number of boxes weighed appearing on the bill of lading as taken from what the shipper reports to the agent he has loaded?
A. Yes sir.
466 Q. What is the nature of your business?
A. Buying and selling fruits and vegetables in carload lots.
467 Q. To what extent do you buy in cars a year; how many cars do you deal with?
A. 500 to 800 cars.
468 Q. You buy all over the country do you?
A. Yes sir.
469 Q. Where is your place of business?
A. At Lincoln, Nebraska.
470 Q. On what basis do you buy as a commission man, owner or what?
A. We buy and pay cash to the grower and sell for cash and work on our own margins.
71 471 Q. Do you have any warehouses?
A. No sir.
472 Q. All your business is conducted in the freight cars?
A. Yes sir.
473 Q. Have you been in Niagara County?
A. Yes sir.
474 Q. Did you ever talk with these people who sold these apples in question to Mr. Pickering?

Mr. Brown: Objects as not proper cross-examination.
Sustained. Exception.

475 Q. Did you ever call any of the merchants at Lincoln to those cars for the purpose of showing them those apples?
A. No sir.
476 Q. You made no attempt to sell them?
A. No sir, not to the merchants.
477 Q. As a matter of fact most of your business is conducted outside of Lincoln?
A. Yes sir.
478 Q. You sell very little of your commodities to the Lincoln merchants?
A. As compared with the outside business we sell very few cars here.
479 Q. A large percentage of your business is peddling isn't it?
A. No sir.
480 Q. But you do quite a lot of that—peddling from the cars?
A. No sir. We don't do any.

481 Q. You did those cars?

A. Well, this was a case of have to in order to save the Northwestern a few dollars.

72 482 Q. You say in this car from Youngstown you took out 10 or 12 bushels of apples at Lincoln?

A. Approximately that many, I didn't measure them.

483 Q. Did anybody go with you when you first went to these cars in Lincoln?

A. I don't recall anybody was with me when I inspected the Youngstown car, but Mr. Dean was with me when I inspected the Ransomville car.

484 Q. I mean when you first went to the car?

A. When I first went to the car Mr. Dean was with me.

485 Q. Now it is the Youngstown car where you went alone?

A. I recall that I was alone; I had ordered that car set to 9th street without going down to inspect it previously, and after the car was set up there I went over and inspected it alone as I recollect it.

Redirect examination

By Mr. Brown:

486 Q. Mr. Whitnack, about how many cars did you handle that season that Mr. Pickering purchased back in New York?

A. 82 cars exactly.

487 Q. Did they all come to Nebraska?

A. No; I would say about 35 or 40% went to Minnesota, they were diverted in transit.

488 Q. Did you find any other frosted or frozen apples in all those shipments, except those two cars?

Mr. Dressler: Objects as irrelevant, and immaterial.

Sustained. Exception.

73 489 Q. Did you receive other cars that Mr. Pickering purchased in New York that were purchased after these cars were purchased?

A. Yes sir.

490 Q. They were from the same locality?

A. Yes, with the exception of Youngstown. I only had one car from Youngstown.

491 Q. But you had other cars from Ransomville after this car S. F. R. D. #8546 was shipped from there?

A. Yes sir.

492 Q. Now were there any other frozen apples in any of those cars, that were purchased back there that year, other than those two so far as you know?

Mr. Dressler: Objects as irrelevant and immaterial.

Sustained. Exception.

493 Q. Mr. Whitnack, referring to the Omaha car, I observe that was shipped from C. Mozer to C. C. Whitnack, whose apples were they?

A. They were my apples.
494 Q. Yours individually?
A. Yes sir.
495 Q. And when was the partnership formed that you now have, the C. C. Whitnack Produce Company?
A. The partnership was formed in August 1914 and we incorporated in February, 1917. Mr. Lyle was one of the partners in the business, the co-partnership was formed in August 1914.
496 Q. And was this account of yours assigned to the partnership?
A. Yes sir.

Witness excused.

74 Mr. C. Mozer, a witness for the plaintiff, was duly sworn, and testified as follows:

Examination-in-chief.

By Mr. Brown:

497 Q. Where do you reside?
A. At 1917 "K" street.
498 Q. In this City?
A. Yes sir.
499 Q. How long have you lived in Lincoln?
A. 13½ years now.
500 Q. What business are you engaged in?
A. In the Poultry, Butter and Egg business.
501 Q. Have you ever been an employe of Mr. Whitnack—have you ever worked for Mr. Whitnack?
A. I did at one time.
502 Q. Were you working for him in the month of February, 1914?
A. Yes, I worked for Mr. Whitnack at that time.
503 Q. About how long did you work for him?
A. Between January and sometime in May that year.
504 Q. What did you do when working for him, did you handle apples, potatoes and various things of that kind?
A. We handled apples, potatoes, hay and a few other things in the season of the year.
505 Q. Now this exhibit "B" showing a shipmment of apples marked from yourself to C. C. Whitnack Produce Company, did you have anything to do with that?
A. Yes, I shipped this bill of lading.
506 Q. At Omaha?
A. Yes sir.
75 507 Q. Did you see the apples that were shipped in that car?
A. I had charge of the loading there, I loaded every box.
508 Q. Do you know what condition they were in?
A. Yes sir.
509 Q. What condition were they in?

A. They were in perfect condition when I put them in the car.
510 Q. They were not frozen in any way?
A. No sir, not frozen, no.
511 Q. Calling your attention to this "O. R. F." I believe it is,—do you know anything about that being on there when you received that bill of lading?
A. It is not my handwriting, I made out the bill of lading, but I didn't make that out.
512 Q. The body of the bill of lading, aside from that, is in your handwriting?
A. Yes sir.
513 Q. In the name of C. Mozer, is that your name?
A. That is my signature.
514 Q. And the letters "S. L. C." is that in your handwriting?
A. No sir.
515 Q. Did you know those were there when that was shipped?
A. I don't think so.

(Mr. Dressler:)

516 Q. Do you know they were there, answer the question?

Mr. Wilson: He has already answered the question.
Court: Overruled. Exception.

(Mr. Brown:)

517 Q. You wasn't the owner of these apples?
A. The Whitnack Produce Company was the owner,—the C. C. Whitnack Produce Company was the owner.
518 Q. Did you see this same car of apples here in Lincoln after they had been shipped to Lincoln?
76 A. If I remember right I had charge of the unloading of them at Robinson's place.
519 Q. And what condition were they in so far as being frozen is concerned?
A. My recollection is that Mr. Dean, I believe, the agent of the Northwestern was notified about these apples being frozen.
Mr. Dressler: I object as incompetent, and irrelevant.
No Ruling.

520 Q. I want to know what is your own knowledge about their condition, about their being frozen when you saw them?
A. The apples were frozen when we took them out of the car and put them in the warehouse at Robinson's, I believe it was; I can't say exactly as to the number of frozen apples in there.

Cross-examination.

By Mr. Dressler:

521 Q. Referring to this "O. R. F." notation on the bill of lading you say that was not on there at the time you got it back from the railway agent after you handed it to him to sign?

A. I can't say, but I am almost sure it wasn't on there, not being in my handwriting.

522 Q. Then you want to give the jury the impression that that notation is a forgery?

A. I don't want to give the impression to anybody, only I am not sure.

77 523 Q. Then you don't know?

A. I am not positive.

524 Q. Do you have any opinion on the subject at all?

A. I do.

525 Q. What are they?

A. Usually in making out a bill of lading I give full instructions on the bill of lading.

526 Q. And sometimes the agent of the railroad company who signs the bill of lading puts something more on there before he signs it don't he?

A. I never had any agent put anything on after I made out the bill of lading.

527 Q. This car was loaded at the Omaha Cold Storage Warehouse wasn't it?

A. I don't think it was the Omaha Cold Storage, I believe it was Swartz & Alexander there.

528 Q. Anyway it was a cold storage warehouse?

A. Yes sir.

529 Q. On the line of the Union Pacific?

A. I am not familiar with the line.

530 Q. Well, it was on the Northwestern was it?

A. I can't say as to that.

531 Q. But you say you superintended the loading of the car?

A. Yes sir.

532 Q. Did you see the barrels and boxes go in?

A. There was no barrels, boxes only. I saw every one of them.

533 Q. No barrels at all?

A. No, not in that car, that I remember of.

534 Q. Your memory isn't very good on that is it?

A. I only remember boxes in that car.

78 535 Q. Did you open any of the boxes?

A. Yes sir.

536 Q. At the time of loading?

A. Yes sir.

537 Q. Why?

A. Just to see the condition they were in.

538 Q. Did you think they were frozen?

A. No, but we wanted to know what condition they were in.

539 Q. How many boxes did you open before the loading was made?

A. Oh, perhaps 5 or 10.

540 Q. 5 or 10 out of 408?

A. Yes sir.

541 Q. That is all you opened?

A. Yes sir.

542 Q. So the most you can say about whether or not these apples were frozen at the time they were loaded is that you opened 5 or 10 boxes out of 408, is that right?

A. Yes sir.

543 Q. Aside from that you don't know what their condition was as to being frozen?

A. Yes, I know there wasn't any frozen apples from the condition the building was in.

544 Q. That is what you know is it?

A. I know they were not frozen from the condition of the building.

545 Q. You didn't look at any except 5 or 10 boxes out of 408 boxes?

A. No sir.

546 Q. That is all you did open?

A. As far as I remember now that is all I did open.

547 Q. Where were you when you made out this bill of lading when you wrote in the blank space?

A. At some freight office of the Northwestern in Omaha.

79 548 Q. That is, you went there to get this form of bill of lading did you, and filled in the blank places to cover your shipment, is that it?

A. I don't remember exactly where I got the form of the bill of lading.

549 Q. It was some freight office anyhow was it?

A. My recollection is we went down to some freight office to some foreman who signed this bill of lading, I am not absolutely sure just what place it was.

550 Q. Did you make out the bill of lading in his presence, or do you remember that?

A. I don't remember that at all just now.

551 Q. Did you sign the bill of lading on the place marked for the shipper and did you pass it over to the agent to sign it?

A. I don't remember, but I certainly must have signed it before I handed it to him.

552 Q. You probably got the form and filled in the necessary information to cover the shipment and signed the form to be signed by the shipper and passed it over to the railway man to sign for the railway company didn't you, is that the way it was done?

A. I don't remember, it would be awful hard for me to remember a little detail of this kind.

553 Q. You don't remember whether or not the railway man put this "O. R. F." and "S. L. C." notation on there at the time he signed it and before he handed it back to you or not do you; you don't remember that do you?

80 A. No, I don't remember exactly when I signed that or when that was filled in; I am positive that I billed that car, and I am positive as to the condition the apples were in.

554 Q. You are as positive as you can be from an examination of 5 or 10 boxes?

A. No, I mean from the general appearance of the boxes, and

from the general temperature of the room and the way we loaded them.

555 Q. Do you know how long those apples had been in your storehouse?

A. They had been there a few weeks, I wouldn't say just exactly how long they had been there, but they had been put in there sometime in January, perhaps around January 20th to the 25th.

556 Q. Where did they come from do you know?

Mr. Brown: Objects as not proper cross-examination.
Overruled. Exception.

A. I think they were Colorado apples.

557 Q. They came from Colorado in January and were placed in storage there, is that right?

A. Yes, but I am not positive, that this is the Colorado apples.

558 Q. You were just in this warehouse the day you loaded them wasn't you?

A. I was in there a few times before.

559 Q. How soon before this day?

A. Oh, perhaps a week or two before.

81 560 Q. So when you spoke of the temperature of the warehouse you have reference to the temperature when you loaded this car?

A. And the time I was in there the other time.

(Court:)

561 Q. What kind of boxes were those?

A. Regular apple boxes.

562 Q. A crate or sort of open or closed?

A. No, just closed solid.

(Mr. Dressler:)

563 Q. Solid?

A. Regular apple boxes.

564 Q. Were the apples wrapped in paper?

A. I don't remember whether this car was or not, we had some wrapped and others not, but I don't remember exactly what these were.

Witness excused.

Mr. J. T. LYLE, a witness for the plaintiff was duly sworn, and testified in chief as follows:

Examination-in-chief.

By Mr. Brown:

565 Q. Mr. Lyle you are one of the partners in the Whitnack Company?

A. Yes sir.

566 Q. How long have you been in the produce business?
A. About 7 years.
567 Q. Did you see this car of apples that was shipped to Grand Island, Nebraska, from Lincoln over the Union Pacific that we have been talking about here?
82 A. Yes, sir, I did.
568 Q. Where did you first see it?
A. In Lincoln.
569 Q. Do you know when you first saw it as compared with the time it arrived?
A. About the 2nd day after it arrived.
570 Q. What was the condition of it?

Mr. Dressler: What one was that?
Mr. Brown: The Ransomville car S. F. R. D. #8546.

571 Q. What was the condition of this car in Lincoln when you saw it?
A. It was badly frozen.
572 Q. You may describe how it was?
A. Well, at this time the weather had moderated and the car was covered with frost almost like snow.
573 Q. Where the frost was coming out of it?
A. Yes sir.
574 Q. What was the appearance of the apples as far as the frost was concerned?
A. Well, they was softening up.
575 Q. Where was the greatest amount of apples frozen?
A. In the ends and sides, but I afterwards found that the bottom was really the worst.
576 Q. What was the condition of the apples in the middle of the piles?
A. In fair shape, good apples.
577 Q. Did you see the car at Grand Island?
A. Yes sir.
578 Q. Did you see it unloaded?
A. No sir, I didn't see it unloaded.
83 579 Q. Did you look after the disposition of the car there?
A. I did.
580 Q. Where were the arangements first made for the disposition of that car, do you know?
A. It was sold to a man named Heath.
581 Q. Where was the arrangement first made for the sale of that car to Mr. Heath?
A. Here in Lincoln.
582 Q. What was the occasion of your going to Grand Island?
A. Well, they started to unload the apples and found them in such bad condition that he absolutely refused to have anything to do with the car, he had not paid for them yet so Mr. Whitnack sent me out there.
583 Q. After you got there what did you do?
A. I went and inspected the apples and immediately looked for someone to sell the car to because it was in bad shape.

584 Q. Then did you sell it?

A. I sold it to a man named Wilson for $100. I tried to get $150 first and he offered me $50 and I finally split the difference with him.

585 Q. Do you think you sold it for all it was worth?

A. I gave it one awful good selling.

586 Q. Now do you know what the value of apples were, such as were in this car in November, 1914, in Lincoln, Nebraska?

Mr. Dressler: The defendant objects to any testimony concerning the market value of the apples at Lincoln, Nebraska, for the reason that the shipment was made pursuant to a bill of lading is-
84 sued by the initial carrier, which is exhibit "A," and in that bill of lading it is provided:

"The amount of any losss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

Overruled. Exception.

A. Yes sir.

587 Q. What was the varieties of apples in this S. F. R. D. car #8546?

A. The most were Baldwins, and just a few Greenings, in this car.

588 Q. What was the fair and reasonable market value of the apples in S. F. R. D. #8546, when it arrived here in Lincoln, if it had not been frozen?

A. About $1.60 to $1.65 a hundred.

589 Q. Did you see the other car L. S. M. F. #140156 in Lincoln?

A. No, I didn't see that car.

590 Q. Did you see car C. & N. W. #14466, in Lincoln?

A. I did not.

Cross-examination.

By Mr. Dressler:

591 Q. You say these apples in car #8546 which you saw in Lincoln were wet with frost?

A. Yes sir.

85 592 Q. Very wet?

A. Well, not so much when I saw them because I saw them two days after the car arrived here and the weather turned off real warm.

593 Q. The apples were softening up were they?
A. Yes sir.
594 Q. Were any of them still frozen solid?
A. Oh yes.
595 Q. What proportion of the frozen ones were still frozen solid when you saw them the next day after they arrived in Lincoln?
A. Well, just principally the top apples where the frost had commenced to leave them.
596 Q. And the car had been open more or less for a day here at Lincoln had it?
A. It had.
597 Q. Do you know what time that car arrived in Lincoln, what day?
A. November 19, 1914.
598 Q. Did you see it the next day?
A. No, I saw it two days after, I saw it about the 21st.

Witness excused.

86 By agreement the following witness for defendant called out of order to permit the witness to leave.

Mr. CHARLES A. SNYDER, a witness for the defendant, was duly sworn and testified as follows:

Examination-in-chief.

By Mr. Dressler:

599 Q. Where do you live?
A. Omaha, Nebraska.
600 Q. What is your occupation?
A. Rate clerk.
601 Q. For whom?
A. The Northwestern Railway.
602 Q. Were you employed by the Northwestern Railway Company on the 21st day of February, 1914?
A. I was.
603 Q. What were you doing then?
A. I was rate clerk.
604 Q. Was it any part of your duty to sign bills of lading on behalf of the agent?
A. At times.
605 Q. Handing you exhibit "D" I will ask you to state whether or not you ever saw that before?
A. Yes sir.
606 Q. Referring to the signature "W. J. Smith" at the bottom with the letter "S" under it, whose handwriting is that in?
A. That is mine.
607 Q. Do I understand you signed that on behalf of the Railway Company?
87 A. Yes sir.
608 Q. Referring to the notation "O. R. F." and "S. L. C." whose handwriting is that?

A. Mine.

609 Q. When were those notations placed on there with reference to the time you signed the agent's name?

A. At the time it was presented for signature.

610 Q. You placed those on before you handed it back to the shipper did you?

A. Yes sir.

Cross-examination.

By Mr. Brown:

611 Q. Mr. Snyder, referring to these letters that counsel just called your attention to on the bill of lading, did you explain to the shipper what those meant?

A. I did not.

612 Q. You didn't call his attention to them in any way?

A. No sir.

613 Q. Have you any independent memory of ever having seen that exhibit before it was handed to you now, or, are you just simply testifying from the fact that you know your signature there?

A. Yes, I know my signature when I see it.

614 Q. And that is the only way that you have of knowing that you saw that particular bill of lading before?

A. Well, I saw it at the time it was signed in the office.

88 615 Q. Have you any independent memory of having seen it at the office at the time you signed it aside from your signature being on there?

A. No sir.

616 Q. If your signature was not there you would never know that you had ever seen that instrument before would you?

A. Not that I know of.

617 Q. Do you have any memory at all relative to the occasion of your signing it?

A. I signed it the day it was issued.

618 Q. You say you signed it the day it was issued because that is your habit of doing that?

A. Yes, that is right.

619 Q. But have you any independent memory relative to the incident of signing and issuing it that day?

A. I didn't issue it, I simply signed the bill of lading handed to me by the man that issued it.

620 Q. You have no independent recollection of the transaction at all at this time, all you know about it is because you see the paper with your signature attached to it now?

A. Only this way because the man shipped the car that day.

621 Q. You have no recollection of it?

A. It was issued the day it was shipped, whenever we get a bill of lading for that kind of a car at our office the car goes forward.

622 Q. You are testifying that this car went out at that time because it is the custom for the car to go out at the time the bill of lading is issued?

A. Yes sir.

89 Redirect examination.

By Mr. Dressler:

623 Q. Those notations are in your handwriting?
A. Yes sir.
624 Q. And you have never seen this document since the time you signed it have you?
A. No sir.

Recross-examination.

By Mr. Brown:

625 Q. Mr. Snyder the rate of the shipment of this car was the same as where the owner didn't assume the risk isn't it?

Mr. Dressler: Objects as incompetent, immaterial, irrelevant, the only competent evidence as to the rate being a certified copy of the tariff sheet.
Overruled. Exception.

A. The rate is just the same when at owner's risk or not.
626 Q. There would be no difference in the rate if the owner assumed the risk than there would be if he didn't assume the risk?
A. No sir.
627 Q. You have but one rate for the shipment of apples?
A. No sir.

Witness excused.

90 Plaintiff resumes its testimony.

Plaintiff's deposition identified as exhibit "E."
Mr. Brown: The plaintiff offers to read in evidence exhibit "E," being the deposition of Mr. Shaver.
No objection.
Exhibit "E" received in evidence and being as follows:

"Mr. SHAFER, being duly sworn, testified as follows:

Mr. Brown:

628 Q. What is your full name?
A. Melvin Shafer.
629 Q. How old are you?
A. 48.
630 Q. Where do you live?
A. In Ransomville, N. Y.
631 Q. How long have you lived in Ransomville?
A. About 8 years.
632 Q. Are you acquainted with George W. Pickering, who purchased apples and shipped them from here in the Fall of 1914?
A. I am.

633 Q. Did you have anything to do with the apples which Mr. Pickering shipped from here?

A. I did.

634 Q. You may state what that was?

A. I loaded the apples for him.

635 Q. To what extent did you see the apples that were placed in this last car?

A. In order to not get my answer confused, was that a bulk car?

636 Q. It was?

91 A. I carried the apples in and dumped them in the car.

637 Q. Did you carry them all in?

A. I could not say I carried all, but nearly all.

638 Q. And were you present during the entire time of the loading of the car?

A. Yes sir.

639 Q. And were you able to make observation of all the apples that were loaded into the car at that time?

A. I was.

640 Q. To what extent, Mr. Shafer, have you been engaged in handling apples; I mean for what length of time?

A. I have handled apples in the orchard and in a commercial way for 25 years.

641 Q. Now what would you say, Mr. Shafer, as to whether any of these apples that were loaded in this last car, that you have referred to, were frozen or frosted?

A. I should say that there were none of them frosted.

642 Q. Would you say that they were not frosted?

A. Yes sir.

643 Q. You do not remember the number of the car?

A. No, I do not.

644 Q. Did Mr. Pickering ship more than one car load of bulk apples?

A. Yes, a great many.

645 Q. In the same Fall?

A. Yes sir.

646 Q. Did you load all of the cars he shipped?

A. Why, I think I had something to do with loading all of them, and when I was at dinner or other times, my assistant was working.

647 Q. Did you merely supervise the job, or did you

92 actually carry the apples in?

A. Both.

648 Q. Do you know the date the last car Mr. Pickering shipped, was loaded?

A. No- exactly, but I should say that it was somewhere between the 10th and 18th of November, but could not tell exactly.

649 Q. Would he load four or five different cars each day?

A. Earlier in the season, but not at that time.

650 Q. But you do not have in mind now any particular car so that you could identify it either by number or date?

A. No sir.

651 Q. How many men did Mr. Pickering have to assist him in loading his car of bulk apples?

A. One, besides myself.

652 Q. Did you make an inspection of apples received from the farmers for frozen apples?

A. Always.

653 Q. Did you make such inspection for frozen apples, during the time you were loading for Mr. Pickering during 1914?

A. Yes sir.

654 Q. Would some times frozen apples be hauled to town and presented for shipment?

A. I do not know of any at any time being presented to Mr. Pickering.

655 Q. Did you know of any frozen apples being hauled to other purchasers at that time?

A. Not at that early date.

656 Q. On what dates were frozen apples hauled?

A. I remember a shipment which Mr. Moore loaded some-
93 time later that I considered frozen.

657 Q. You mean George B. Moore?

A. Yes sir.

658 Q. He did some loading for Mr. Pickering?

A. Whether Mr. Pickering bought a load from him I could not say, that is too long ago.

STATE OF NEW YORK,
County of Niagara, ss:

I, Isabel Cornell, a Notary Public, within and for said County and State, hereby certify that the depositions of the foregoing witnesses were taken by me and reduced to writing by me in accordance with the attached stipulation; that the witnesses were duly sworn to tell the truth, the whole truth and nothing but the truth and said depositions were taken in accordance with said stipulation.

(Signed) ISABEL CORNELL,
[SEAL.] *Notary Public.*

Charges:

Notary Fees	$ .75
Taking and transcribing testimonies	9.25
	$10.00

Paid by defendant, $2.00 witness fees.
Paid by plaintiff, $2.00 witness fees.

The noon hour having arrived a recess was taken until this Friday, afternoon at 2:00 o'clock, February 15, 1918.

2:00 P. M. Friday, February 15, 1918, court met pursuant to adjournment of this morning and trial proceeded.

94 Mr. C. H. DEAN, a witness for the plaintiff, was duly sworn and testified as follows:

Examination-in-chief.

By Mr. Brown:

659 Q. Mr. Dean, where do you reside?
A. Lincoln, Nebraska.
660 Q. How long have you lived in Lincoln?
A. About 25 years.
661 Q. What occupation are you engaged in?
A. Agent for the Northwestern railroad.
662 Q. How long have you occupied that position?
A. Well, about 11 years.
663 Q. Do you know when car L. S. M. S. #140156 shipped from Youngstown, New York, to Lincoln, Nebraska, was received here in Lincoln by the Northwestern Railroad?
A. Yes sir.
664 Q. Please state?
A. Yes, it arrived on the evening train November 24, 1914.
665 Q. Did you see that car at that time?
A. No sir.
666 Q. Were you out of the city?
A. Yes sir.
667 Q. Did you see that car at any time?
A. No sir.
668 Q. Do you know when car S. F. R. D. #8546 arrived in Lincoln from Ransomville, New York?
A. It arrived in Lincoln in the forenoon of November 19, 1914.

669 Q. Did you see that car after its arrival?

95 A. Yes sir.

670 Q. How soon did you see it after it arrived?
A. Well, I can't say for sure. I think it was that afternoon or the following morning, I can't say which.
671 Q. Who was present when you saw it?
A. Mr. Whitnack,—I think it was Mr. Whitnack and myself.
672 Q. Do you remember anything about the condition of the vents of that car, or have you any record of the vents of it?
A. I think I have got it on that one— (Examining papers.) The vents were closed.

(Court:)

673 Q. That is, when it arrived here?
A. Yes sir; that is the car inspector's record of it.
674 Q. Mr. Dean, what is the fact, whether those vents were closed on that car that morning after it arrived here, do you know?
A. Well, I don't recollect myself, but as I say, the car inspector's record shows the vents closed.
675 Q. You don't know yourself about it?
A. No sir, I don't recall that portion of it. That car inspector's report would be made, in all probability on the arrival of the train.

Mr. Wilson: Moves to strike out of the record the statement of what the car record shows as not responsive to the question, incompetent and irrelevant. And the plaintiff also moves to strike out the answer to the next to the last question as to what the car inspector's report shows as not responsive, incompetent, immaterial and irrelevant.

Sustained. Exception.

96 676 Q. Do you remember of seeing several cars that day, Mr. Dean, that came in together where the vents were open?

Mr. Dressler: What day?

677 Q. On the day of the arrival of this car S. F. R. D.?

Mr. Dressler: Objects as irrelevant, immaterial as to what may have been the condition of other cars.

Sustained. Exception.

678 Q. Do you remember of examining the apples in the car?

A. In this car?

679 Q. Yes?

A. Yes sir.

680 Q. What was the condition of those apples so far as being frozen was concerned?

A. They were frozen.

681 Q. Do you remember of seeing this car, with 5 or 6 other cars, refrigerator cars, that came in at the same time, do you remember of seeing them on that 19th day of November?

Mr. Dressler: Do you remember, is the question.

A. I remember of seeing some about that date; I can't say whether it was that morning without referring to the record.

682 Q. Were they on the same train as this car?

A. If they were the apples I think they were, they were on that same train, now as I say without looking I can't tell.

683 Q. Do you remember of examining several cars at that time relative to whether the vents were open or shut on the several cars that did come in on the same train as this car?

Mr. Dressler: Objects as irrelevant, immaterial as to any cars except the car in suit.

97 Court: I should think that objection would be good.

Mr. Wilson: It is simply the way of getting his attention to that particular car.

Sustained. Exception.

684 Q. To what extent did you examine the apples in that car?

A. Well, I don't—I know Mr. Whitnack and I went into the car.

685 Q. Did you examine the apples enough to know in what portion of the car they were frozen the most?

A. Well, they seemed to be frozen all over the top, I don't recall of anything further than that.

686 Q. So far as you could see they were frozen all around where you could see them?
A. Yes sir.

Cross-examination.

By Mr. Dressler:

687 Q. Mr. Dean, did you see Mr. Pickering here in Lincoln shortly after he returned from the East?
A. Well, I saw him sometime afterwards, I can't say just when.
688 Q. Well, was it shortly afterwards, or a long while afterwards?
A. Well, I would have to refer to a letter to state that.
689 Q. You may refer to anything that will refresh your memory?
A. (Witness examines papers.) I thought I had a letter along the lines of the question asked, but the best of my remembrance was—— (Interrupted.)

Mr. Brown: Objects as not proper cross-examination.
Overruled. Exception.

98 A. My remembrance of the matter was that in talking the matter over with Mr. Pickering sometime afterwards that he advised—— (Interrupted.)

Mr. Brown: Moved to strike out the answer as not responsive to the question.
Sustained. Exception.

690 Q. About what time was it?
A. I would say off-hand a month or so afterwards.
691 Q. Did you have some conversation with him about the apples in transit and the weather conditions in transit, yes or no?
A. Yes sir.
692 Q. Did he make any statement as to the weather conditions during the time those New York apples were in transit?

Mr. Brown: Objects as not proper cross-examination.
Mr. Wilson: And for the further reason that it isn't a statement made by Mr. Pickering at the time the transaction took place.
Court: I think that anything Mr. Pickering said after making the shipment was nothing that would bind his principal; it must be a part of the res gestæ so as to be considered a part of the transaction. Objection sustained.
Exception.
Mr. Dressler: I want to show by this witness that the shipper and consignee of these two cars of apples from New York State made a statement concerning the weather conditions the first day after the shipment left the loading point, which has a material bearing on the facts in this case.

99 Court: I don't think he can make a statement like that that will bind his principal, and it is not proper cross-examination either.
Exception.

693 Q. Now when was the letter you have reference to, written?
A. December 9, 1914.
694 Q. That is a letter that you are using to refresh your memory some memorandum you made of the facts concerning this conversation?
A. Yes sir.
695 Q. And was that at the time when the controversy over the condition of the apples was still in existence?
A. Yes sir.

Mr. Dressler: I would like to make proof of what Mr. Pickering said.
Mr. Wilson: Objects as not proper cross-examination, and not the proper form of impeaching a witness; no proper foundation laid, and not made while the transaction to which the alleged conversation referred was taking place.
Sustained. Exception.
Mr. Dressler: The defendant offers to prove by this witness that at the time the two New York shipments of apples were in Lincoln, Nebraska, shortly after they had arrived at their destination, G. W. Pickering, the shipper and consignee made the statement to the witness that the first day after the shipment left the loading point the weather turned extremely cold.
Mr. Brown: Objects as not proper cross-examination, not the proper form of impeaching a witness, no proper foundation laid, and not made while the transaction to which the alleged
100 conversation referred was taking place.
Sustained. Exception.

Witness excused.

Mr. Ross R. Robinson, a witness for the plaintiff, was duly sworn and testified as follows:

Examination in chief.

By Mr. Brown:

696 Q. You live in the city of Lincoln?
A. Yes sir.
697 Q. How long have you lived here?
A. 26 years.
698 Q. What business are you engaged in?
A. In the wholesale produce business now.
699 Q. How long have you been engaged in that line of work?
A. Well, off and on for about 12 years.
700 Q. That includes handling apples does it?
A. Apples, potatoes, onions, cabbage and so forth.
701 Q. Do you remember of seeing a carload of apples in February, 1914, that was shipped from Omaha to Lincoln, being Mr. Whitnack's apples and which were turned over to you to handle in some way?

A. They were turned over to my father, at the time I was in the house as manager, yes, I know of them.

702 Q. Do you remember the condition of those apples?

A. Yes sir.

703 Q. How were those apples, in bulk, barrels or boxes?

A. No they were about—let's see, mostly boxes and probably 40 or 50 barrels.

101 704 Q. You may state what condition those apples were in, as far as being frozen was concerned?

A. Well, they were frozen.

705 Q. To about what extent?

A. Well now, we sorted them all, the boxes, and put what we call the pie apples in barrels and we had 28 barrels which was sold to the restaurants at 50 cents a barrel.

706 Q. There were 28 barrels of the kind of apples got out of the boxes?

A. Yes sir.

707 Q. Now were those apples frozen apples?

A. Yes, they were frozen, soft apples.

No Cross-examination.

Witness excused.

Mr. C. C. WHITNACK, having been previously sworn herein, was recalled in chief, and testified as follows:

Examination in chief:

By Mr. Brown:

708 Q. Mr. Whitnack, referring to this same car of apples that came from Omaha, did you see those apples in Omaha before they were shipped to Lincoln?

A. Well not immediately before, I saw them at the time they were put in storage.

709 Q. About when was that?

A. January 5th.

710 Q. Did you make an examination of them?

102 A. Yes sir.

711 Q. What was their condition at the time you made the examination?

A. First class condition.

712 Q. Was there any frozen apples among them?

A. No sir.

(Court:)

713 Q. Are those the apples that came from Colorado?

A. Yes sir.

(Mr. Brown:)

714 Q. Mr. Whitnack, have you got the freight bills or anything in your possession to show the amount of freight you paid on the two cars, one from Youngstown and the other from Ransomville?

A. I have not.

715 Q. What became of them?

A. I filed them with the original claim.

716 Q. With the Railroad Company?

A. Yes sir.

717 Q. Did you ever receive them back?

A. I never did.

718 Q. Do you know the rate you paid on those apples?

A. Yes sir.

719 Q. What was the rate you paid?

A. 48½ cents per hundred.

720 Q. And that was based on the weight given in the bill of lading?

A. Well, not necessarily, the cars were billed at the actual weight, the carriers don't always recognize that as the correct weight; the weight might be a little more or a trifle less than the way-bill.

721 Q. Would it likely vary materially from that?

103 A. Not likely to vary very much; they may have taken them in on the exact weight; they usually do where they take the billing weight as the basis for computing the freight charges.

722 Q. And the rate you paid was 48½ cents upon whatever weight they were billed at?

A. Yes, the rate was the same from both Youngstown and Ransomville.

723 Q. Mr. Whitnack, I wish you would state to the jury what this freight would amount to at 48½ cents per hundred pounds upon the amount shown by the bills of lading?

Mr. Dressler: Objects as incompetent, immaterial, irrelevant. Overruled. Exception.

A. I haven't got it figured out but it wouldn't take but a short time to do that. (Witness makes computation.) The weight of that L. S. M. S. car was 30,130 pounds at 48½ cents per hundred amounts to $146.13; and on the other car S. F. R. D. #8546 the invoice weight was 29,520 pounds at 48½ cents amount to $143.97; of course I don't know—those are only approximate figures.

724 Q. They might be a little more or less?

A. Yes sir.

Cross-examination.

By Mr. Dressler:

725 Q. You say you saw these apples that came from Omaha at Omaha January 5, 1914?

104 A. I think that is the date, about that time, I would not swear positively.

726 Q. Did you open any boxes?

A. Yes sir.

727 Q. How many?

A. Well, I can't say off-hand, perhaps 15 or 20.

728 Q. And nailed them up again?

A. Yes sir.

729 Q. How many barrels did you open?

A. I saw the barrels myself, we shipped them into Omaha in bulk, several cars of these, and the 50 barrels was part of those in bulk that we barreled at Omaha and put in storage.

730 Q. You didn't see them after that date, January 5th?

A. No sir.

731 Q. And they were loaded February 21st?

A. I believe that was the date.

Witness excused.

Plaintiff Rests.

Defendant's Case.

Mr. C. C. WHITNACK, having been previously sworn herein, was recalled on behalf of the defendant, and testified as follows:

Examination in chief.

By Mr. Dressler:

732 Q. Mr. Whitnack, have you produced from your office files the report which Mr. Pickering rendered to you of what
105 he paid for apples back there in New York?

A. No, I don't have that report.

733 Q. Where is it?

A. Filed with the original claim, the only papers he furnished us was an invoice, and we furnished him a checking account back there, the apples were paid for by check on the local bank, our books and records show only where we remitted to him in sums of $1,000 in drafts and the original invoices which he sent us showing the varieties and number of pounds in a car was filed with my original claim together with the paid freight bill.

734 Q. Didn't he report to you what he paid per hundred for the various apples?

A. Not for the various apples; for instance he paid 50¢, 60¢, or 70¢ for a part of the car, and he would simply estimate about what that car cost and tell me how many pounds and varieties approximately, and give me a list of the various farmers he bought from and how many he bought from each one.

735 Q. You went back to New York where Mr. Pickering had dealt with those farmers and checked up what he had paid them didn't you?

A. I did not.
736 Q. Did you go back and make some investigation of it?

Mr. Brown: Objects as immaterial.
Overruled. Exception.

A. No sir.
737 Q. Didn't you go back there?
A. No sir I did not.
106 738 Q. You wasn't back there?
A. No sir I was not, I haven't been in New York state for 10 years.
739 Q. Did you send some one?
A. I did.
740 Q. To check up Mr. Pickering's transactions?
A. Yes sir.
741 Q. And he checked them up?
A. Yes sir.
742 Q. Did you say he did?
A. He did.
743 Q. Isn't it true that you found from that check of Mr. Pickering's transactions that he had paid to the farmers one price and reported to you that he had paid a higher price and that as a result of that check up you required Mr. Pickering to refund you several thousand dollars?

Mr. Brown: Objects as incompetent, immaterial, irrelevant.
Sustained. Exception.

Mr. Dressler: The defendant offers to prove by the witness on the stand that after Mr. Pickering returned from New York State, and after he had reported that he had paid a certain price to the farmers there for the apples in question that Mr. Whitnack sent an investigator down to New York State to check up Mr. Pickering's transactions and discovered that Mr. Pickering had been making false reports to him as to the prices he had paid and upon this investigation he called upon Mr. Pickering to refund to him, and Mr. Pickering paid back to Mr. Whitnack several thousand dollars.

107 Mr. Brown: Objects as incompetent, immaterial, irrelevant.
Sustained. Exception.

No cross-examination.

Witness excused.

Mr. Dressler: The defendant now offers to read from exhibit "E," the deposition of W. F. Connor, taken at Ransomville, New York.
No objection.

"Deposition- of Witnesses, on Behalf of Both Parties to be Read as Evidence at the Trial of the Case of C. C. Whitnack Produce Company vs. Chicago & Northwestern Railroad Company, in the District Court of Lancaster County, Neb., Taken Pursuant to the Attached Stipulation of the Parties.

Appearances:
Mr. E. W. Brown, for the plaintiff.
Mr. W. Dressler, for the defendant.

W. F. CONNOR, being duly sworn, testified as follows:

Mr. Dressler:

744 Q. What is your name?
A. W. F. Connor.
745 Q. You live in Ransomville?
A. Yes sir.
746 Q. What is your business?
A. Making cider and vinegar and drying and evaporating apples.
747 Q. How long have you lived in this county?
A. Always.
108 748 Q. How old are you?
A. 45 years.
749 Q. How long have you been in apple business?
A. For 20 years.
750 Q. In your work as dryer, have you ever kept a record of temperature and weather conditions at the Fall of the year?
A. Yes sir.
751 Q. Did you keep any record in October and November, 1914?
A. As to frost and cold weather we had that season?
752 Q. What other record did you keep?
A. I kept a record of first frost and first cold weather.
753 Q. How did you keep this record?
A. I wrote it on the walls of my office.
754 Q. What record did you make of the first cold weather in the fall of 1914?
A. The first cold weather and snow was October 26th, 1914.

Mr. Brown (at trial): The plaintiff moves to strike out the answer as not responsive.
Overruled. Exception.

755 Q. How did you acquire this information as to weather conditions?
A. By personal observation.
756 Q. Your office is in Ransomville?
A. Yes sir.
757 Q. October 26th, 1914, was the date of first cold weather and snow?
A. Yes sir.
758 Q. When, if at all, did you make a record of the first freezing weather?

A. November 16th, 1914, it froze up.

109 759 Q. What do you mean by "froze up?"

A. The ground and apples on the ground froze up.

760 Q. Then you made the first record of cold weather October 26th, 1914?

A. Yes sir.

761 Q. Has it been your custom to keep any record of any kind of other cold weather?

A. No sir.

762 Q. Just state what actual record you wrote on the walls?

Mr. Brown (at trial): Objected to as irresponsive.

(Question withdrawn.)

763 Q. You have just been to your office?

A. Yes sir.

764 Q. Did you again look at your records?

A. Yes sir.

765 Q. How is this record written on the walls?

A. It is written in pencil.

766 Q. Did you make an accurate copy?

A. Yes sir.

767 Q. Will you read it?

Mr. Wilson (at trial): Objects as incompetent, immaterial, irrelevant, no proper foundation laid, and not the best evidence.

Sustained. Exception.

A. First cold weather and snow October 26th, 1914. First frost November 16th, 1914.

768 Q. You are acquainted with a man named George W. Pickering?

A. Yes sir.

110 769 Q. Have you met him in Ransomville?

A. Yes sir.

770 Q. Have you had business transactions with him?

A. At times.

771 Q. During his business transactions in Ransomville and vacinity did he do enough business to have a reputation as a business man?

A. Yes sir.

772 Q. Are you acquainted with his reputation.

Objected to as not consistent, *irreverent* and not within the discussion.

Mr. Wilson (at trial): Objects as incompetent, immaterial, irrelevant, and not a proper method of impeachment.

Sustained. Exception.

A. His reputation was not very good.

Mr. Brown "I move to strike out the answer."

(Reporter's Note:) Objection to question having been sustained answer was not read at trial.

773 Q. How long did Mr. Pickering transact business as an apple dealer?

A. About three years.

774 Q. Was he here before or after you knew him?

A. I don't remember of seeing him after 1914.

775 Q. What particular reputation did he have as to being honest or dishonest?

Objected to as improper, *irreverent* and not within the discussion.

Mr. Wilson (at trial): Objects as incompetent, immaterial, irrelevant.

Sustained. Exception.

111 Mr. Dressler: The defendant excepts to the exclusion from the evidence of that part of folios "7" and "8" of the deposition of Mr. Connor, concerning the reputation of Mr. Pickering.

A. Dishonest.

Mr. Wilson (at trial): Objects as incompetent, immaterial, irrelevant.

Sustained. Exception.

(Cross-examination.)

Mr. Brown:

776 Q. Mr. Connor, how many years have you kept a record of the condition of the weather in the Fall as you spoke of, in your place of business?

Mr. Wilson (at trial): You had better not read the cross-examination on the point of what the record contains because the Court has shut that out.

Mr. Brown (at trial): I will omit reading the cross-examination.

Mr. Dressler: I will offer and read the cross-examination on behalf of the defendant.

777 Q. Mr. Connor, how many years have you kept a record of the condition of the weather in the Fall as you spoke of, in your place of business?

Mr. Wilson (at trial): Objects as irrelevant, immaterial because there is now on record in evidence.

Sustained. Exception.

(Reporter's Note:) The cross-examination excluded by the Court is as follows:

112 A. For about four or five years?

778 Q. Four or five consecutive years up to the present time?

Mr. Wilson (at trial): Objects as irrelevant, immaterial and because there is now on record in evidence.

Sustained. Exception.

A. Last year I did not operate, only making cider.
779 Q. You simply kept a record during the years you were in ne apple business?

Mr. Wilson (at trial): Objects as irrelevant, immaterial and be- ause there is now no record in evidence.
Sustained. Exception.

A. Yes sir.
780 Q. Have you given in your testimony the whole record you ept relative to the weather in the Fall of 1914?

Mr. Wilson (at trial): Objects as irrelevant, immaterial and be- ause there is now no record in evidence.
Sustained. Exception.

Mr. Dressler: Do I understand that the plaintiff can exclude their wn cross-examination of defendant's witnesses?
Court: They don't need to offer it, but when you offer it you offer t for what it is worth, and you simply call that witness as your itness and you can offer it so far as relevant and material, but you re not bound by the same rules.

A. Yes sir, just as I have it.
781 Q. When you made this record October 26th, 1914, it was nerely an indication of snow at that time?

Mr. Wilson (at trial): Objects as irrelevant.
Sustained. Exception.

113 A. Yes sir.
782 Q. Have you any personal recollection of the condition n October 26th, 1914, or do you have to depend entirely upon the ecord which you made?

Mr. Wilson (at trial): There is no objection to that question.

A. I depend upon the record.
783 Q. The only personal recollection which you now have is that t was snowing at the time?

Mr. Wilson (at trial): No objection.

A. Yes sir. Cold and snowing.
784 Q. No recollection of how cold?

Mr. Wilson (at trial): No objection.

A. It must have been freezing.
785 Q. And so far as you know, the weather was not any colder than it had been in order that the snow could fall?

Mr. Wilson (at trial): No objection.

A. It might have been colder than that.
786 Q. So far as you know, you could not say that it was any colder than just enough to have snow fall?
A. I have written cold weather and snow.

Mr. Wilson (at trial): Moved to strike out the answer as irrelevant, and not responsive to the question.

Sustained. Exception.

787 Q. Did you purchase any apples after October 26th, 1914, in your work and business?

A. Oh yes, for my purpose.

788 Q. That was for evaporation?

A. Yes sir.

789 Q. Do you remember of having any difficulty relative to finding frozen apples immediately after October 26th, 1914?

114 A. Nothing to bother us.

790 Q. You have the first freeze marked November 16th, 1914. You do not know that there was any weather that was cold enough to have frozen or injured apples prior to November 16th, 1914?

A. I do not remember whether there was or not?

791 Q. You say that you had some dealings with Mr. Pickering?

A. Yes sir, I weighed his apples.

792 Q. You weighed the apples which he purchased in 1914?

A. I weighed some of them. I made a bargain with him and furnished him an office and desk. I am located on the steam track where they load stuff.

793 Q. Now, Mr. Connor, was it your business then to look after the weighing and handling of the scales?

A. Not particularly mine. It was my office help.

794 Q. The weighing then of the apples which Mr. Pickering bought was done on your scales, either by you or your office help?

A. I might have weighed some, my help might have weighed some, and he might have weighed some himself.

795 Q. Mr. Connor, what would you say as to the apples weighed on your scales, as to whether they were weighed correctly or not?

A. Correctly.

796 Q. Then they were weighed correctly as far as you were aware?

A. Yes sir.

(Redirect examination.)

Mr. Dressler:

797 Q. How far is Youngstown from Ransomville?

A. About 7 miles.

115 798 Q. How high is it compared to Ransomville?

A. Just about the same. Youngstown is on the river and Ransomville is on the lake.

799 Q. Would the weather generally average the same in both places?

A. I should think so. It might vary a few degrees.

Recross-examination.

Mr. Brown:

800 Q. How far is Youngstown from Lake Ontario?
A. It is right on the lake, that is the Government lands are right on the lake, but no farm lands.
801 Q. And Ransomville is about four miles from Lake Ontario?
A. Yes sir.
802 Q. What effect has the lake upon the temperature and weather on the grounds near the lake, if any?
A. Well as a rule they do not get as early frost.
803 Q. As a rule they will not get as early freezes on the lake, as they will back some distance?
A. No sir. Early in the Fall it is colder on the lake than it is back here.
804 Q. Then it is warmer back here early in the Fall, because of the wind and air coming off the lake?
A. Yes, I presume that is what makes it.

Mr. Dressler: The defendant offers in evidence the deposition of C. F. Bass, taken at the same time and place and by the same people. No objection.

116 C. F. Bass, being duly sworn testified as follows:

Mr. Dressler:

805 Q. What are your initials, Mr. Bass?
A. C. F.
806 Q. Where do you live?
A. Ransomville, N. Y.
807 Q. What is your business?
A. Freight Agent for the New York Central Railroad.
808 Q. Were you freight agent for the New York Central Railroad on November 13th, 1914?
A. Yes sir.
809 Q. Do you know Mr. George W. Pickering?
A. Yes sir.
810 Q. Do you remember the occasion of his shipping some apples from Ransomville on that date?
A. Yes sir.
811 Q. Did he ship a car load of apples in car No. S. F. R. D. 8546 from Ransomville on that date?
A. Yes sir.
812 Q. On the morning of the day these apples were loaded by Mr. Pickering, were you up on the freight yards where the car was standing?
A. I was in the yards every morning between 7.00 and 8.00 o'clock, and must have been there on that morning?
813 Q. Do you remember the occasion of checking the yards on the morning that this car was loaded?

A. Well, I could not say now, or swear to it, that it was on the morning of the 13th of November, that that was the morning I examined the frozen apples.

117 (At trial:) Moved to strike out from the answer of the witness the part relative to frozen apples, as the same is not responsive.

Mr. Wilson (at trial): And for the further reason that it is irrelevant.

Sustained. Exception.

814 Q. Did you make an examination of the apples which Mr. Pickering was loading or which were on the platform or ground to be loaded into this car we have mentioned?

A. No. I made an examination of the apples, but I could not swear that he loaded them into that car.

815 Q. Did you on the day that Mr. Pickering was loading apples and at the time this car No. S. F. R. D. 8546, was being loaded: make an examination of the apples?

A. I can swear that I examined the apples that were loaded by Mr. Pickering, but I could not say that that was the date.

816 Q. I understand that you discovered some frozen apples that Mr. Pickering was loading?

Mr. Wilson (at trial): Objects as irrelevant.

Overruled. Exception.

A. I recall checking the yard and that Mr. Pickering had about 25 barrels of apples on the ground with heads out, opposite the cars he was loading, but as to the date, I could not swear as I did not make a record.

817 Q. It was in the morning of November 13th, 1914?

A. It was a morning after a hard freeze.

Moved to strike our answer that it was a morning after a hard freeze.

(At trial:) Motion waived.

118 818 Q. Do you remember that there had been a freeze the night before you discovered the frozen apples?

Objected to as leadin*d* and suggestive.

(Objection waived at trial.)

A. Yes sir.

819 Q. Did the apples which you saw frozen and which were Mr. Pickering's apples go into the cars which Mr. Pickering was loading: that is did he load all the apples which were being loaded?

Objected to as leading, suggestive and assuming a state of facts not proven.

(Question withdrawn.)

820 Q. Handing you a paper which the reporter has marked as exhibit "I," you may state what it is?

Objected to for the reason that the exhibit is the best evidence as what it is.

(At trial:) Objection withdrawn.

A. I should say that it was a record of handling of shipment of at car and the weather conditions on that date.

821 Q. Is exhibit "I" a record which you made personally?

A. Yes sir.

822 Q. At the time you wrote this letter exhibit "I," were the cts fresh in your memory concerning the matter?

A. No that is taken from the station records.

823 Q. At the time you wrote exhibit "I" did you have before ou the facts that are recorded in exhibit "I"?

A. Yes sir.

19 824 Q. State whether or not the facts recorded on exhibit "I" are correct?

Objected to as causing confusion of the witness, and as the wit ess has already stated that exhibit "I" is copied from another record nd not taken from his own recollection.

(At trial:) Objection waived.

A. Yes sir.

825 Q. At the time you wrote this letter did you then remember he facts as to the night being very cold?

A. Well what I had in mind was I examined that pile of apples. went over to get some to eat, or I would not have noticed them. I sually got my supply for the day at that time.

Mr. Brown: I move to strike out the answer as not responsive.

(At trial:) Motion waived.

826 Q. You say that the reason you happened to see the frozen apples, is that you went to the barrel or pile of apples from which Mr. Pickering was loading to get to get an apple to eat?

A. Yes sir.

827 Q. Were these facts fresh in your memory at the time you wrote exhibit "I"?

A. I should say they were.

828 Q. What records do you have at your station regarding the loading of cars?

A. Why our records include the date the car arrived; the day it was placed and loading commenced, and the day it was released and the car was sealed and the day and hour it went forward.

829 Q. In what shape is that record kept?

A. In a book known as a Car Register.

120 830 Q. Does that have a great many entries in it?

A. Oh yes. It includes all cars handled in and out of our station.

831 Q. Is it a large book?

A. Quite.

832 Q. It covers a period of how many years?

A. About three or four.

It is stipulated between the parties that exhibit "I" correctly shows the date the car was loaded and the hour it was released and went forward.

833 Q. Did you see these cars which Mr. Pickering loaded at Ransomville after they were loaded?
A. I saw the cars, but not the contents.
834 Q. Would you seal the cars?
A. I would seal them and examine the ice-boxes and plugs.
835 Q. What kind of a car was car S. F. R. D. 8546?
A. A refrigerator car.
836 Q. Was it in good condition?
A. The records show that it was.

(Cross-examination.)

Mr. Brown:

837 Q. Mr. Bass, you do not know personally that this car in which this shipment of November 13th, was made, was in good condition do you only from the records?
A. The only record which I have on the car is the condition of plugs and ice-boxes.
838 Q. Then when you refer to records showing that car is in good condition, you only have refereence to the condition of the plugs and ice-box?
121 A. Cars are usually examined as to whether floor is wet or dry.
839 Q. Then so far as you know now, the records only show the condition of the plugs and ice-box?
A. Yes sir.
840 Q. And you have no personal recollection relative to the condition of the car?
A. No sir.
841 Q. Now, Mr. Bass, you would not give a B/L for a car of apples if you knew that there were any frozen apples in the car, without marking the B/L to show that there were frozen apples in the car?
A. Yes sir.
842 Q. You mean to say Mr. Bass that you would give a B/L for a car of apples entirely regardless of the condition of the apples, and without making a notation on the B/L relative to the condition?
A. I do it every day. Our records are taken of the car and contents, and any shipper requesting a clean B/L receives it. I do not know why we would not, because we load drying and evaporating apples.
843 Q. Mr. Bass if a car of apples were frozen when received by you, would it be your duty to have your records show that they were frozen?
A. Yes sir.
844 Q. And does your record in this case show anything as to

whether or not the apples in this car were frozen on the day as referred in exhibit "I"?

A. No, I do not think they did. I did not find it.

122 845 Q. Have you any record other than exhibit "I", that in any way shows that the apples in car S. F. R. D. 8546 were frozen?

A. No, I have not.

846 Q. When was this record marked exhibit "I", made?

A. January 17th, 1915.

847 Q. And this is the only record if any nature that you have relative to the apples being frozen in car S. F. R. D. 8546?

A. Yes sir.

848 Q. Now Mr. Bass, did you see any frozen apples in the car above designated?

A. No, I did not.

849 Q. And the apples that you saw that were frozen, you do not know personally that they were put in this car referred to?

A. No, I do not.

(Redirect examination.)

Mr. Dressler:

850 Q. But the frozen apples which you saw were a part of the shipment that Mr. Pickering loaded in some one of his cars?

A. Yes sir.

(Recross-examination.)

Mr. Brown:

851 Q. Do you mean to say Mr. Bass, that you saw frozen apples that you know of your own personal knowledge were put in some of the cars that were shipped by Mr. Pickering?

A. There were in his piles and cars had been ordered placed opposite these piles.

123 852 Q. How far were the cars when loaded by Mr. Pickering from the railroad switch?

A. I should judge about 600 feet.

853 Q. I believe you stated that you saw the cars that morning?

A. Yes sir.

854 Q. Have you any recollection of having seen the cars that Mr. Pickering was loading, more frequently than every morning?

A. My duties take me up there a dozen times a day, sealing cars. I would probably go by them.

855 Q. Then you would only see these cars that were being loaded by Mr. Pickering, and the apples he was loading, as your duties would take you along in sealing and looking after other matters?

A. Yes sir.

856 Q. And your duties would take you there at least once every day and sometimes oftener?

A. Yes sir.

857 Q. Now you have no way of knowing, have you Mr. Bass, as to what Mr. Pickering did with the apples which you saw, and which you say were frozen?

A. No I had no way unless by checking and I could not stop right then to do that.

858 Q. And so far as you know the apples that, you saw that were frozen may have been removed and not placed in the cars at all?

A. They might have done that.

Mr. Dressler:

859 Q. But these frozen apples were placed in position for being loaded?

124 A. Yes sir.

860 Q. And the apples which were so placed were loaded by Mr. Pickering?

A. They were Mr. Pickering's apples and he was shipping apples but I did not see him put them in the cars, and there were not any taken away.

Mr. Brown:

861 Q. You mean, Mr. Bass, that you did not see them taken away, and they could have been taken away and you not have seen them taken?

A. Yes sir.

862 Q. Now you say the apples which were frozen that you saw were in position to be loaded. Were not all the apples which were brought in, placed in position to be loaded as they were taken from farmer's wagons?

A. Some were brought in in crates and without heads and dumped into the cars. The apples I have in mind were drawn in by farmers when Mr. Pickering had no car to load them into and they were then laid on the ground until his car came, when it was ordered placed opposite the apples on the ground.

863 Q. That is the car was ordered placed opposite the apples where the farmer had unloaded them?

A. Yes sir.

864 Q. Were the apples which you saw frozen in bulk, baskets or in barrels?

A. In barrels without heads.

865 Q. And about how many barrels did you see in that condition?

A. I did not examine more than one barrel.

125 866 Q. You examined one barrel and found it frozen?

A. They were not frozen, just frosted.

867 Q. Describe to what extent you examined it?

A. I took three or four apples off the top and noticed that they were frosted.

868 Q. Was this frosted condition owing to the fact that the barrel did not have a cover at the time?

A. Yes sir.

869 Q. Then the freeze was not sufficient to affect the apples only on top of the barrel?
A. As long as I did not examine it fully, I could not tell.
870 Q. You made no examination except as to the one barrel?
A. That is all.
871 Q. This barrel, had been standing near the car over night uncovered?
A. I am not sure whether the car was there or not, but they were standing within about 15 feet of the tracks, and were uncovered.
872 Q. And by being uncovered, you mean that they were standing without the heads on?
A. On end without the heads.
873 Q. Do you know how many barrels such as you just described there were?
A. About 25.
874 Q. Do you know whether the freeze that night was of sufficient extent that it would have affected apples in barrels had they the heads on?
A. I do not know, but I do not think so.

126 Mr. Dressler:

875 Q. But there were about 25 barrels of apples on the ground with the heads out and exposed to the cold that night?
A. Yes sir.

Mr. Brown:

876 Q. Was this car S. F. R. D. 8546 the last car that was loaded by Mr. Pickering in the Fall of 1914?
A. I could not answer that without looking over the records.

Mr. Dressler: The defendant offers in evidence defendant's exhibit "I" referred to in the deposition of the witness C. F. Bass.
Mr. Wilson (at trial): Objects to exhibit "I" attached to the deposition of the witness Bass, except as to the date of the release and forwarding of the car; as incompetent, irrelevant, and no proper foundation laid.
Court: I think I will sustain the objection. Exception.
Exhibit "I" refused, and is as follows:

127 The New York Central and Hudson River Railroad Company.

Ransomville, N. Y., 1/17/15.

Mr. H. C. Howe, C. & N. W.
Chicago, Ill.

Claim 2-642292.

Referring to att'd:
Car S. F. R. D. 8546, placed 11 a. m. Nov. 13, loaded and released Nov. 13, 5 P. M. and forwarded Nov. 13th, 7 P. M. Apples loaded from farmers wagons, Night very Cold. Apples Undoubtedly

Frozen when in the Orchard. Weather not Cold Enough to Freeze in Refgr. Cars, Copy billing att'd.

Respt.

C. F. BASS, *Agt.*

Exhibit I.

128 *Deposition of Hugh W. Hale, Identified as Defendant's Exhibit* "1."

Mr. Dressler: The defendant offers in evidence the deposition of Hugh W. Hale, taken November 15th, 1917.

No objection.

Exhibit "1" received and read as follows:

"In the District Court of Lancaster County, Nebraska.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

The following stipulation was entered into between Messrs. E. W. Brown, of Lincoln, Nebr., attorney for plaintiff, and Wymer Dressler, of Omaha, Nebr., attorney for the defendant at the office of the defendant, at 12th and Farnam streets, Omaha, Nebraska, at three o'clock p. m., November 15th, 1917:

It is hereby stipulated by and between the parties hereto that depositions may be taken at this time and place, before Wm. S. Heller, Notary Public, a shorthand reporter and Notary Public, of any witnesses the defendant may desire to call; that said depositions may be taken in shorthand and extended into longhand in the absence of the witnesses, and that the signatures of the said witnesses are hereby waived; and when transcribed to be properly certified and forwarded to the Clerk of the District Court at Lincoln, Nebraska.

129 HUGH W. HALE, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination.

By Mr. Wymer Dressler:

877 Q. State your name?

A. Hugh W. Hale.

878 Q. Where do you live?

A. I live at Apartment 35 the Angelus.

879 Q. What is your business?

A. General Yard Master of the Chicago, St. Paul, Minneapolis & Omaha Railroad.

880 Q. How long have you been yard master for the Northwestern Railway?

A. Eight years.

881 Q. And is that for the Northwestern and the Chicago, St. Paul, Minneapolis & Omaha roads jointly?

A. Yes sir.

882 Q. Do you know a man named Downing?

A. Yes sir.

883 Q. What was his business while he was with the Northwestern?

A. He was called by the name of engine foreman.

884 Q. Where is he now?

A. I do not know his exact whereabouts, but he is working up somewhere around the Twin Cities.

885 Q. At St. Paul or Minneapolis?

A. Yes sir.

886 Q. You have not heard from him for a long time?

A. Not for four or five months.

130 887 Q. What was his business on the 21st day of February, 1914?

A. Engine foreman on the North end engine.

888 Q. And what were his duties in that occupation?

A. To pull connecting line transfers.

889 Q. Answer the question?

A. To pull connecting line transfers, make up and break up trains.

890 Q. What arrangement is there for receipt by the Chicago & Northwestern Railway Company of carload shipments of freight loaded on the tracks of the Union Pacific?

A. The Union Pacific will switch cars on track known as number 18 which is located near 14th and Nicholas streets.

891 Q. Is that what is known as the Union Pacific transfer?

A. Commonly called Union Pacific transfer, yes sir.

892 Q. Are you familiar with the handwriting of switch-foreman Downing?

A. I am perfectly.

893 Q. How long did you work with him?

A. About five years.

894 Q. I now hand you a book which bears a large number 13 on the outside, I will ask you to state what that is?

(Handing the witness a book containing records.)

A. That is Harry Downing's record of the receipt of a car from the Union Pacific at 9.30 a. m.

895 Q. That is enough. Now, is the record you have before you Mr. Downing's switching record for cars which he pulled off of the Union Pacific transfer?

A. This indicates that he received this car from the Union Pacific Railroad.

131 896 Q. Is there anything in that book with reference to C. & N. W. car 14466 under date of February 21, 1914?

A. Yes sir.

897 Q. Is that found on page — on what page of the record is that found?

A. Well, it is the page indicated as 5 in blue pencil.

898 Q. Do you recognize that as the record made by conductor Downing?

A. Yes sir.

899 Q. When would conductor Downing make a record of the transfer of that car from the Union Pacific Transfer to the Northwestern yards, with respect to the time he actually pulled the car in the switching movement?

A. He would make it at the time he coupled his engine on it preparatory to moving it into our yards.

900 Q. Do you recognize this record at page 5 as being in the handwritng of conductor Downing?

A. Yes sir, of yard conductor Downing.

901 Q. Engine foreman is the official title, is it?

A. Yes sir.

Mr. Dressler: I now offer to read in evidence in behalf of the defendant the entries in the record referred to to save attaching the record itself to the deposition.

Mr. Brown: There is no objection to the record being read instead of the book itself being attached.

Mr. Dressler: It is as follows:

"February 21, 1914, C. & N. W. Car 14466, contents, Apples, Switched from Union Pacific Transfer 9.30 p. m. February 21, 1914, by conductor Downing. Sealed with seals number 74005 East and 74006 West. Shipment consigned to Lincoln, Nebraska."

Cross-examination.

Questions by Mr. E. W. Brown:

132 Mr. Brown: I don't care to offer the cross-examination.
Mr. Dressler: Then I will read the cross-examination.

(Cross-examination read by Mr. Dressler as follows):

902 Q. Mr. Witness, do you know when the record was made on page 5 from which you just testified?

A. That record was made somewhere between six p. m. of February 21st, and seven a. m. on February 22nd, indicated there as 9:30 p. m.

903 Q. Where has this book which you have testified to been kept from the time this record has been made until the present time?

A. It was kept in my office at 14th and Burdette street until the 28th day of February, or the 1st day of March I should say, 1914, then it was sent to the local freight office at 14th and Davenport for permanent file along with all other records for that month of February.

904 Q. How many other records are there contained in this book you have referred to, which perhaps has 100 or more pages in it?

A. 51 other records and 2 miscellaneous notations.

905 Q. What is the date of the first record contained in this book?

(Handing said book to the witness.)

A. That is on the miscellaneous notations.

906 Q. Turn to the record and give the date of the first record of cars in that book?.

A. February 5th, 1914.

907 Q. How many cars on that date?

A. One.

908 Q. Turn to the next date on which you have a record and state the number of cars on that date?

A. February 9, a record of one car.

909 Q. Turn to the next date and give the number of cars on that date?

133 A. On February 10th a record of 27 cars.

910 Q. Turn to the next date and give the number of cars on that date?

A. February 14th a record of 20 cars.

911 Q. And turn to the next date and give the number of cars on that date?

A. February 21 a record of one car.

912 Q. Turn to the next date and give the number of cars?

A. February 25th a record of one car.

913 Q. And turn to the next date and give us the number of cars there?

A. One car.

914 Q. And what is the date?

A. No date shown on this.

915 Q. And turn to the next date and give the number of cars?

A. That is the last record.

916 Q. And the book that you hold in your hand from which you have testified is the only record that you have of cars transferred from the Union Pacific to the Northwestern during the month of February, 1914?

A. No, I have possibly six other books of cars transferred between the Northwestern and the Union Pacific.

917 Q. And why are there so many books kept in keeping the record of cars for that month?

A. There is a book put out on the first day of each month, for each particular engine foreman on each shift. Our engines work in tricks, day and night tricks. This particular book was put out for the use of the North *en* engine foreman working between six p. m. and seven a. m. each day.

918 Q. And that book would show the transfers then of
134 the one particular engine foreman, in all of the transfers that he made?

A. That was the intention when it was put out, but through the practice that some engine foreman indulge in those books are occasionally taken home, in their hurry to get through in the morning and are not brought back in time to send out on the regular shift, and other books are substituted. This particular book has been subject to that practice as it shows a record here of cars that were received on the day shift at 11:30 a. m. It is the intention to have the engine foreman use the same book the entire month.

919 Q. And what is done if the engine foreman does not have a book with him at the time the shift is made?

A. Well, he must have the book when he starts out. Though there has been cases where the engine foremen send out the book and he would take a card from the side of the car and make his notations on it until he gets to the office and then make his notation in the book.

920 Q. Then you cannot tell from the record before you that the record was made just at the time the car was shifted, can you?

A. In this case I can, because he shows his time on this. In another case, in this book the intentions are that the record was made as I explained because the man does not show the time.

921 Q. The time that is shown, when does that indicate, when the shift was made, or when the record was made?

A. When the shift was made.

135 922 Q. Then you would not know from that whether that record was made at the time the shift was made, would you?

A. Yes sir. Where he shows the time. That indicates that that is the time when the shift was made. If he omitted the time it would indicate that it might be a memo.

923 Q. Then you mean to say that the time that is noted there indicates the time the record was made?

A. Yes sir.

924 Q. There is only one time noted there, is not that so?

A. On this book, in that particular case, yes.

925 Q. You of course have no personal knowledge as to when the shift was made, and your only knowledge is that the record develops before you?

A. Yes sir. My personal knowledge is limited to the records as shown in the book before me.

Redirect examination.

Questions by Mr. Wymer Dressler:

926 Q. Was Mr. Downing at that time working under your general supervision?

A. Yes sir.

927 Q. And were you his immediate superior in the matter of switching cars from the Union Pacific Transfer over to the yards, were you?

A. Yes sir.

928 Q. What would it indicate as to where the car had been loaded by the fact that it was received by the Northwestern on the Union Pacific Transfer? I mean on what railroad?

136 A. That would indicate that it was either loaded on Union Pacific trackage in Omaha, or on the Union Pacific or some of its connections at a junction.

929 Q. It would indicate would it not, that the car had not been loaded on the line of the Northwestern Company?

A. Yes sir. It would indicate that it was not loaded on the Northwestern line.

930 Q. Would the seal records of this car in question indicate that the car had been received by the Northwestern Company under a seal attached by some other company?
A. Not necessarily. I am not well enough posted on the serial number seals of the Northwestern at that time to state that positively. Although my recollection is that we used but one series of seals here, which was just those on our line.
931 Q. Well, would the Union Pacific ordinarily set cars loaded with freight on this transfer to be switched by the Northwestern without being under seal?

Mr. Brown: Objected to by the plaintiff as being leading and calling for the conclusion of the witness.
(Objection waived at trial.)

932 Q. What is the practice in that respect?
A. It is not the practice of any railroad to deliver cars to another line without being properly sealed if they are under load.

Witness excused.

By agreement of the parties hereto the signature of the witness to the foregoing deposition is hereby expressly waived.

137 Mr. Dressler: The defendant offers in evidence the deposition of W. H. Little, taken at the same time and place.
No objection.

W. H. LITTLE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth, as follows:

Direct examination.

By Mr. Wymer Dressler:

933 Q. State your name?
A. W. H. Little.
934 Q. Where do you live?
A. I live at 5411 North 24th street, Omaha, Nebraska.
935 Q. What is your occupation?
A. Railroad clerk.
936 Q. For whom?
A. The Illinois Central Railroad.
937 Q. Where, here in Omaha?
A. Yes sir.
938 Q. Did you ever work for the Northwestern Railroad?
A. I did.
939 Q. Did you work for the Northwestern Railroad in February, 1914?
A. Yes sir.
940 Q. Did you work for them on the night of February 21, 1914?

A. Yes sir.
941 Q. Here in Omaha?
A. Yes sir.
942 Q. What was your business then?
A. Yard clerk.
138 943 Q. As yard clerk did you have any duties in connection with the receipt or inspection of carload shipments of freight in refrigerator cars?
A. Yes sir.
944 Q. What duties did you have in that respect?
A. It was my duty to inspect ice bunks of refrigerators and see what condition they were in, the amount of ice, if any, and report it.
945 Q. Did you have anything to do with inspecting the condition of the plugs and hatches and drain pipes on such cars?
A. Yes sir.
946 Q. In your work of making such inspections, would you make any record of the facts and things you might find at the time of the inspection?
A. Yes sir, I believe I did.
947 Q. Handing you a record which contains approximately 300 pages, and opening the record to a particular page, I will ask you to state if you recognize this open page as being in your handwritng?

(Handing the witness record book.)

A. I do.
948 Q. Is it or is it not?
A. It is.
949 Q. Is that some record which you made? (Pointing to writing on said page.)
A. Yes sir.
950 Q. Is it some record you made in the course of your duties as inspector of refrigerator cars?
A. Yes sir.
139 951 Q. On what date did you make the record?
A. Well, let's see—that record was made—I cannot tell from that. There is no date on it.
952 Q. There is no date on it?
A. No.
953 Q. By referring to the next page in line can you tell?
A. On the 22nd—February 21st.
954 Q. The record before you was made February 21st, 1914?
A. Well, this should be the 22nd as it was at 3.35 a. m.
955 Q. Of the 22nd?
A. Yes sir.
956 Q. Is there anything on that record with respect to the car C. & N. W. 14466?
A. Yes sir.
957 Q. Is the date shown opposite that car number on that record in your handwriting?
A. Yes sir.
958 Q. And is that data the result of some inspection which you made of that car?

A. Yes sir.

959 Q. And did you make such inspection personally?

A. Yes sir.

960 Q. And when did you make these entries in the record with respect to the time you inspected the car, at the time?

A. Shortly after.

961 Q. And was it any part of your duties to take a memorandum of the number of the seals on that car?

A. Yes sir.

140 962 Q. And when did you make the record of such seal numbers?

A. At the same time.

963 Q. At the same time?

A. Yes sir.

964 Q. Is this record which I show you and which bears your signature a record with respect to C. & N. W. car 14466 which you made?

A. Yes sir, it is.

965 Q. And made in the manner in which you have just described?

A. Yes sir.

Mr. Dressler: I now offer to read in behalf of the defendant into the record the portion of this record with regard to C. & N. W. car 14466 instead of offering the record itself in evidence.

Mr. Brown: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and no proper foundation has been laid, but no objection is made because the offer is to read from the record instead of offering the record itself.

(At trial:) Overruled. Exception.

Mr. Dressler: It is as follows:

"Report of cars under refrigeration and vent at Omaha station. C. & N. W. Car 14466, extra train No. 345. Time 3.25 a. m. Position of hatches and plugs: Plugs in. Hatches closed. Seal records No. 74005 and 74006."

966 Q. Have I correctly read the record as it appears here?

A. Yes sir.

967 Q. Now refreshing your recollection from this record, what does it show as to what inspection you made of that car?

A. Well, I examined the bunkers and found the conditions to exist as they are there.

141 968 Q. Just as stated in the record?

A. Yes sir.

Cross-examination.

Questions by Mr. E. W. Brown:

969 Q. Was it your duty Mr. Little, to inspect all the cars that came in on the Illinois Central during the time that you were on duty?

A. You mean on the C. & N. W.?

970 Q. I mean the C. & N. W. Ry.?
A. Yes sir, it was; that is of refrigerators.
971 Q. How many hours during the day were you on duty?
A. Well, I think I was on duty from six P. M. to seven A. M.
972 Q. Now, the inspection that you made of this car, what hour was the inspection made, and of what date?
A. Well it was made about, I should judge about,—well, I cannot *really now* just exactly what time that inspection was made.
973 Q. What day of the month was it made?
A. February 22nd, 1914.
974 Q. Can you tell whether it was the morning of February 22nd or the evening of February 22nd?
A. No sir, I cannot.
975 Q. How do you know whether it was February 21st or February 22nd?
A. Well, only by this record, that is all, the indications of the record.

142 976 Q. Now will the record that you made, for instance from six o'clock February 21st to seven o'clock on February 22nd show as made on two dates, or will it all show as having been made on one date?
A. One day I believe.
977 Q. And how can you tell whether this record was made on the 21st or on the 22nd?
A. Well, from the simple fact, I never used to get these records on this train going out until just a little while before the train left as a rule.
978 Q. Well, you have no way of knowing what time this record was made between the hours of six o'clock P. M. and seven o'clock A. M. have you?
A. Yes, at 3:35 A. M.
979 Q. Then it was 3:35 A. M. of February 22nd?
A. Yes sir.
980 Q. How many cars did you usually inspect during a period beginning at six o'clock P. M. and ending seven o'clock A. M.?
A. They averaged in number,——
981 Q. About how large would be the largest number?
A. Well, I could not say. I never kept—I never made any particular count of them.
982 Q. Would not you have any——
A. Probably in the neighborhood of 10 or 15 or 20.
983 Q. You think 20 would be the most that you——
A. 20 would be——
984 Q. 20 would be the most you would inspect during any 13 hour period?
A. Yes sir, I think so.

143 985 Q. Mr. Little, how many plugs are there in each of the refrigerator cars?
A. Four.
986 Q. Where are they located?
A. Each end, two in each end.

987 Q. What position at the ends, at the back of the car, or near the bottom, or half way up?
A. At the top of the car.
988 Q. And where are the hatches located?
A. Right over the plug. They close over them. The hatch is right over the plug.
989 Q. Now in making the inspection what do you do?
A. Pull open the hatch and pull out the plug and look in it to see if there is any ice in it, and replacing them if the weather is cold enough.
990 Q. Then your action upon whether they are replaced depends upon the condition of the weather?
A. Yes sir.
991 Q. That is upon the temperature?
A. Yes sir.
992 Q. You have no memory at all of what you did relative to this car, have you?
A. Only from what the records indicate there.
993 Q. And if there was a mistake in recording that record, of course you would not know it at this time?
A. No.
994 Q. And what is the fact did you make a mistake in these records sometimes?
A. No.
144 995 Q. Never?
A. I am not infallible.
996 Q. You would not want to swear positively that there was no mistake in that record, and that the facts relative to the plugs and hatches on that particular car are as the record states here?
A. Well, I would rather think they are just as the record shows.
997 Q. That would be your opinion, but you would not want to swear positively that was the case, would you?
A. No, I would not swear positively to that. I would swear to that record. I would not say about that special car.

Redirect examination.

Questions by Mr. Wymer Dressler:

998 Q. Your purpose when you make these inspections is to make a correct record of them though?
A. Yes sir.
999 Q. And the record before you about this car is in the same condition now is it, as when made?
A. Yes sir.
1000 Q. And have you any reason to believe that it is other than correct?
A. No sir, I have not.

Recross-examination.

Questions by Mr. E. W. Brown:

1001 Q. Mr. Little, I am not sure whether I understood your purpose in making the examination of the plugs and hatches, and in the examination of the car. State that again if you will?

A. I did not quite get that?

1002 Q. Question repeated.

A. To see whether they are closed in cold weather or open in warm weather.

1003 Q. And did you have in view making any examination relative to the ice in the cars?

A. Yes sir.

1004 Q. And do you make an examination as to whether there is ice in the cars during the whole winter period, do you?

Q. Well, the examination at that time of the year is not made for to get ice inspection, it is to get the ventilation inspection, such as is made there.

1005 Q. And in warm weather you want the vents open for the purpose of getting air, and in the cold weather you want them closed in order to protect the car from freezing?

A. Yes, that is the purpose.

Redirect examination.

Questions by Mr. Wymer Dressler:

1006 Q. That is, the vents are permitted to be open in weather that is 32 degrees above zero?

A. Yes, that is standard refrigeration.

1007 Q. What about the ventilation, where there is ice in the bunkers?

A. We just simply examine them to see the amount of ice that is in there, to see that they do not get too low on ice, and to keep them well iced.

1008 Q. Ventilation and ice in the bunkers usually go together?

A. No, it is exactly the opposite.

1009 Q. You have the vents closed when you have ice?

A. Yes. When the vents are open it is standard ventilation.

1010 Q. Is that in warm weather, you mean?

A. Yes.

1011 Q. But in weather which is cool enough to not require any ice in the bunkers, what is the fact as to when the vents will be open or closed?

A. They will be open or closed when the thermometer rises abouve 32 degrees. That is, if it is on a rising temperature; a man would not go to work and open the vents on a car that was going into a cooler climate, or going into a night temperature, or if the thermometer was below 32 degrees.

1012 Q. The purpose of opening and closing the vents is to regulate the temperature of the car?
A. Yes sir.
1013 Q. Regardless of whether it has ice in it or not?
A. Yes sir.

Witness excused.

By agreement of the parties hereto the signature of the witness to the foregoing deposition is hereby expressly waived.

147 Mr. Dressler: The defendant also offers to read in evidence the deposition of E. Pearson, taken at the same time and place.
No objection.
(Deposition read by Mr. Dressler at trial as follows:

E. PEARSON, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth, as follows:

Direct examination.

By Mr. Wymer Dressler:

1014 Q. You may state your name?
A. E. Pearson.
1015 Q. Where do you live?
A. I live at 4339 Marcy street.
1016 Q. In Omaha?
A. Yes sir.
1017 Q. What is your business?
A. I am the chief yard clerk at the C. & N. W. and C. St. P. M. & O. yard office.
1018 Q. And what was your business on the 22nd day of February, 1914?
A. I was working at the yard office at the time.
1019 Q. Was it any part of your duty to make up a record of the contents of out going trains at that time?
A. Yes sir.
1020 Q. And how would you make up that record? I mean from personal observation of the trains, or *who* was it done?
A. Yes sir, personally.
1021 Q. Did you make that from personal observation of the train?
A. According to the records I did.
148 1022 Q. Do I understand that you would go along the train after it was made up and take a record of the number of the cars and other dats in connection with the train?
A. I went down one side and up the other.
1023 Q. Did you make any record of the time of the departure of the train?
A. Yes sir.

1024 Q. And of the conductor handling the train at—and out of Omaha?

A. Yes sir.

1025 Q. And of the number of the train?

A. Yes sir.

1026 Q. I now hand you a book which has a large number "25" on the outside, and opening the book to page 5 in blue pencil, I will ask you if you recognize the record on that page 5 as one which you made?

(Handing the witness record book.)

A. Yes sir.

1027 Q. Are all the entries in that page in your handwriting?

A. Yes sir.

1028 Q. And is there any reference in that record to C. & N. W. car 14466?

A. Yes sir.

1029 Q. When was that record made with respect to the time of your inspection of the train?

A. Prior to leaving.

1030 Q. How long prior?

A. Well, that is, I could not just — of this train or any train, because trains may be made up two hours or three hours or a certain time before their departure.

149 1031 Q. Is the record made up before or after the train is made up?

A. It is made after the train is made up.

1032 Q. So the record would be made some time after the train is made up and before it departs?

A. Yes sir.

1033 Q. Was this record which you have before you made correctly at that time? At the time it was made?

A. Yes sir.

1034 Q. And is it in the same condition now as when it was made by you?

A. There is two marks on it. (Pointing.)

1035 Q. I mean so far as your duty is concerned?

A. Yes sir, it is the same.

1036 Q. There are some additional check marks on it since you made it?

A. Yes sir.

Mr. Dressler: I now offer, in behalf of the defendant to read in evidence that part of the record just referred to which relates to car C. & N. W. 14466.

Mr. Brown: The plaintiff objects to it as being incompetent, irrelevant, and immaterial, and further that no proper foundation is laid, but no objection is made because the offer is to read from the record instead of offering the record itself.

(At trial:) Overruled. Exception.

Mr. Dressler: Said offer reads as follows:

"Extra train No. 345 in charge of conductor Wheelock February 22, 1914. Departing time 3:35 A. M. C. & N. W. Car 14466. Seal record, 74005 on one side and 74006 on the other side. Contents, Apples. Shipped by C. Mozer of Lincoln, Nebraska."

1037 Q. Do you know whether or not these seal numbers appearing on that record are C. & N. W. seals or Union Pacific seals?

A. No, I do not.

150 1038 Q. May or may not these seals have been changed for C. & N. W. seals prior to the time of the departure of the train?

Mr. Brown: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and leading and calling for the conclusion of the witness.

Mr. Brown (at trial): We withdraw the objection.

A. Well, there is other records that would indicate that. I could not tell from there.

1039 Q. These seals might have been changed for C. & N. W. seals?

A. I do not quite get that question?

1040 Q. My inquiry is this: Are these seals the seals which were on the train at the time that it departed, that is what I mean?

A. Yes sir.

1041 Q. So these would be the departing seal numbers.

A. That was the departing seal number. Those were on the car at the time the train was checked.

Cross-examination.

Question by Mr. E. W. Brown:

(At trial:) Mr. Brown: I don't care for the cross examination.
Mr. Dressler: I don't care for it either.

(Reporter's Note: Cross-examination not read at the trial and omitted herefrom.)

Witness excused.

By agreement of the parties hereto the signature of the witness to the foregoing deposition is hereby expressly waived.

151 Mr. Dressler: It is hereby stipulated between the parties that the defendant may procure from the Government Weather Bureau located at Omaha, a certified copy of the hourly temperature records for February 21st and 22nd, 1914, and that the same may be offered and received in evidence with like force and effect as though the Government Weather Observer had been called as a witness and testified to said temperatures from his records.

I, Wm. S. Heller, a Notary Public, within and for Douglas County and state of Nebraska, do hereby certify that C. C. Whitnack, W. H. Lillte and E. Pearson, were by me severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that their said depositions were reduced to writing by myself, that their signatures thereto were waived by the parties at the time said depositions were taken; that they were taken at the time and place in the foregoing stipulation and caption set out; that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit, and that there were no adjournments.

In Witness Whereof, I have hereunto set my hand and official seal this 26th day of November, 1917.

(Signed)
[SEAL.] WM. S. HELLER,
Notary Public in and for Douglas County, Nebraska.

My Com. expires Feb. 2, 1921.

My Fees: $8.40.
Paid by defendant.
(Signed) WM. S. HELLER,
Notary Public.

152 Mr. Dressler: I want to say for the purposes of the record, that I called Mr. Welch, the Official Observer, over the phone and asked him to make up that certificate, and he said it was against the rules to certify under seal, but that he would be glad to furnish the information on the regular form; and he wrote me a letter and enclosed his temperature records.

Letter identified as defendant's exhibit "2," and envelope identified as defendant's exhibit "2-*a*."

Mr. Dressler: I now offer in evidence exhibits "2" and "2-*a*."

No objection.

Exhibits "2" and "2-*a*" respectively received in evidence and read to the jury by Mr. Dressler as follows:

(Here follows form of hourly temperature on February 22 and 23, 1914, marked pages 152*a* and 153.)

DISTRICT COURT, LANCASTER COUNTY

Address correspondence to
Official in Charge
Local Office, Weather Bureau

U. S. DEPARTMENT OF AGRICULTURE

LOCAL OFFICE OF THE WEATHER BUREAU

OMAHA, NEBR.

November 26th, 1917.

Mr. A. A. McLaughlin,

Law Dept., C. & NW. Ry. Co.,

Omaha, Nebraska,

Dear Sir:

Referring to your letter of the 15th, instant, I beg to inclose. herewith, a form showing the hourly temperatures, at Omaha, Nebr., on February 21st and 22nd, 1914. The data thereon is a true and correct copy of the station record of the U. S. Weather Bureau at Omaha.

Very respectfully,

L. H. Welsh.
Official in Charge.

(1 incl.)

PLAINTIFF'S DEFENDANT'S EXHIBIT
2
MINOR S. BACON
REPORTER

Form No. 1078 D—Met'l. PLAINTIFF'S DEFENDANT'S EXHIBIT
2-a
MINOR S. BACON
REPORTER

U. S. DEPARTMENT OF AGRICULTURE, WEATHER BUREAU.

1534

Station, Omaha. Nebr. Data, Hourly Temperatures.

Date.	A. M.												P. M.											
1914	1	2	3	4	5	6	7	8	9	10	11	Noon.	1	2	3	4	5	6	7	8	9	10	11	Mid't.
Feb. 21	30	30	31	32	32	32	33	34	34	35	35	36	37	39	40	41	41	40	40	38	37	36	29	27
" 22	26	24	23	21	19	17	16	15	14	13	13	12	11	10	10	9	9	8	7	7	6	5	4	3
3																								
4	Note- All Temperatures entered hereon were above zero.																							
5																								

154 DEFENDANT'S EXHIBIT 2-A.

Minor S. Bacon, Reporter.

[*Envelope.*]

U. S. Department of Agriculture.

Weather Bureau.

Official Business.

Penalty for Private Use $300.

[Stamped:] Omaha, Neb'r., Nov. 26, 2.30 p. m., 1917.

Mr. A. A. McLaughlin,

C. & N. W. Ry Co.,

Omaha, Neb'r.

Law Dep't.

155 *Deposition of K. K. Hicks, Identified as Defendant's Exhibit "3."*

Mr. Dressler: The defendant now offers to read in evidence the deposition of K. K. Hicks, taken at Fremont, Nebraska, on the 10th day of November, 1917.

No objection.

Deposition of K. K. Hicks read by Mr. Dressler as follows:

In the District Court of Lancaster County, Nebraska.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Deposition.

Depositions of Sundry Witnesses Taken on Behalf of the Defendant in the Case of C. C. Whitnack Produce Company vs. Chicago & Northwestern Railway Company, Pending in the District Court of Lancaster County, Nebraska, Taken Pursuant to the Following Stipulation:

Appearances:

E. W. Brown, Attorney for Plaintiff.

W. Dressler, Attorney for Defendant.

Stipulation.

It is hereby stipulated and agreed between the parties hereto that the defendant may take the deposition of any witnesses it may desire to call at Fremont, Nebraska, this 10th day of November, 1917, before Florence E. Maple, Notary Public, without the service of any notice. It is further stipulated that said depositions may be taken in shorthand by the Notary and transcribed in the absence of the witnesses and the signatures of the witnesses are hereby waived.

156 K. K. HICKS, being by me first duly examined, cautioned and solemnly sworn, testified as follows:

Examination by Mr. Dressler:

1042 Q. Mr. Hicks, where do you live?
A. Fremont, Nebraska.
1043 Q. What is your business?
A. Freight agent for the Northwestern.
1044 Q. How old are you?
A. Fifty-six.
1045 Q. How long have you been in the employ of the Northwestern Railway Company?
A. Since February 1st, 1888.
1046 Q. How long have you been employed as agent for the Chicago & Northwestern at Fremont?
A. Since October 15th, 1906.
1047 Q. How much total railroad experience have you had?
A. From 1888 to the present time.
1048 Q. Are you familiar with the method of keeping the records at the station at Fremont respecting the arrival and departure of carload shipments of freight at and from Fremont Station?
A. It is done under my supervision.
1049 Q. What sort of records are kept of the arrival of trains at Fremont containing carload shipments of freight?
A. Forward and Receiving Book, Form #111.
1050 Q. What data is kept concerning the arrival of carload shipments of freight at Fremont?
A. The train number, conductor's name and time of arrival or departure.

157 1051 Q. Is any record kept of the numbers of the various cars and the kinds of cars?
A. Car initial, car number, from where and to and number.
1052 Q. When is such record of the condition of an incoming train made with reference to the time the train comes into the station?
A. Within a very short time after the arrival of the train.
1053 Q. What do you mean by a short time?
A. When we get the bills in, sometimes they can't book it right immediately on arrival of the train. It has to lay over probably fifteen, twenty or thirty minutes, possibly on account of booking an outgoing train. One man books both.

1054 Q. You spoke of bills, what bills?

A. Way bills.

1055 Q. What is a way bill?

A. A way bill is a manifest of the shipment, describing what the shipment consists of, where from and to, car initial and car number.

1056 Q. Is it the invoice for each shipment which accompanies the train with the shipment?

A. I don't know whether you would call it an invoice or not. It is a description of the contents of the car.

1057 Q. Is it the record which the railroad people use for advising their various agents and servants of the contents of a particular shipment?

A. Yes.

1058 Q. Who carries that record?

A. The conductor carries it from one station to the other.

1059 Q. When a car arrives at Fremont——

158 A. I wouldn't say that in every instance. Sometimes the car is transported on a slip bill and the way bills are mailed direct to destination.

1060 Q. As a general thing the way bills accompany the train and are carried by the conductor?

A. As a usual thing but not in every instance.

1061 Q. Regardless of the fact of how the way bills may be transported, that is, whether by the conductor handling the train in which the shipment moves or by mail, are or are not the way bills used as a source of information at the station for making up the station records?

A. Yes, they are.

1062 Q. Now when a train comes into Fremont containing carload shipments, explain the process which is gone through for making a record at Fremont of the arrival of the train and the cars in the train?

A. The conductor brings the way bills with him to the clerk in the Yard Office along with the switch list. The switch list shows the car initial, car number and destination of cars and other information that may be of interest, such as weight or something of that nature. These are given to the yard clerk at the yard office on arrival of train. He in turn books, makes a record in Book Form #111, of these way bills handed in by the conductor.

1063 Q. What other data does the yard clerk put in the record of trains incoming?

A. He gives the date and the hour of arrival.

1064 Q. And the name of the conductor?

A. And the name of the conductor.

1065 Q. Handling the train?

159 A. Yes.

1066 Q. Now what sort of record is made of similar facts for outgoing trains?

A. The same record as incoming.

1067 Q. Now, explain the process which the yard office would go

through with for making a record of the contents of an outgoing train from Fremont?

A. They would first—the conductor would check up his train, go — the yard clerk and ask for bills for the cars that he has in his train. The yard clerk would sort out the bills and then make a record in this book, form #111, of the car initial, car number, contents, forwarding station and destination station. Also show the train number, conductor's name and time of departure.

1068 Q. When is that record made with reference to the time the train departs from the station?

A. That's made right close or within, I presume, anyway half an hour or less time before the departure of the train. Sometimes right after the departure of the train.

1069 Q. What you would call the outgoing record is a list of the cars contained in the outgoing train?

A. List of cars and contents.

1070 Q. Are you familiar with the method of handling shipments of perishable freight in refrigerator cars, in a general way?

A. Just as we handle them here at Fremont.

1071 Q. Are you familiar with the method here at Fremont?

A. Yes.

1072 Q. What is the fact as to whether any provision is made upon occasion for heating refrigerator cars in the winter-time when necessary?

160 A. Yes.

1073 Q. What *d*ort of heat is pro*fi*ed for refrigerator cars carrying perishable freight, when any kind is provided?

A. It is artificial heat from either oil stove heaters or charcoal heaters.

1074 Q. Do you use both kinds of heaters in Fremont for that purpose?

A. I think at that time we used the oil heaters, in 1914. At the present time we use charcoal heaters and occasionally an oil heater that gets in.

1075 Q. That's a coal oil stove is it?

A. Coal-oil.

1076 Q. What method do you have at your station here at Fremont for making a record of the fact of the placing of heat or a stove of some kind in a refrigerator car in the winter-time?

A. During that period a record was made of way bills showing station from and to, the date and car number in which placed and heater number.

1077 Q. Is that way bill some record which you make showing the fact that a heater has been placed in a particular car?

A. Yes.

1078 Q. What is done with that way bill?

A. The way bill accompanies the car and is attached to the original way bill that carries the freight and accompanies the car.

1079 Q. So what you call a heater way bill is attached to the way bill for the shipment?

A. Yes sir.

1080 Q. That accompanies the freight?

A. Yes sir.

161 1081 Q. When such record—when is such way bill made up with reference to the time the heater is placed in the car? In the usual course of business?

A. As a usual rule the heater is placed in the car at various times before the way bill is made. In some cars it would probably be two or three hours and some cars maybe a few minutes before.

1082 Q. Now with reference to the records which are made showing heaters placed in cars of perishable freight, what is the practice with respect to getting that heater back to the station?

A. From destination?

1083 Q. Yes?

Mr. Brown: Objected to as immaterial.

(At trial:) Objection withdrawn.

A. It is returned on a regular way bill.

1084 Q. What do you mean by a regular way bill?

A. It's a way bill which shows station from and to, date, waybill number and heater number with advance charges covering the charges of the heater.

1085 Q. When a way bill is made out by your station for a heater placed in a car which is going to some other station, to whom is that heater billed according to your way bill?

A. It is billed to the agent at destination.

1086 Q. When you get it back from the destination agent, to whom is the heater billed?

A. It is billed to the agent at originating point.

1087 Q. Do I understand then that the heater is charged

162 up on your records to the destination agent and then is returned from the destination agent and charged up to the station which placed the heater in the car?

A. Yes sir. Heaters at that time carried a charge of $20.00.

1088 Q. Did that represent the va*m*ue of the heater?

A. The oil stove.

1089 Q. Was that the Company's method of keeping track of its heaters?

A. It was.

1090 Q. I hand you a large book and will ask you to state what it is?

(Hands witness book.)

A. (Witness examining book:) This is what we call the "Receiving Book" of incoming trains.

1091 Q. Does that book contain records of the kind you have been describing for recording the arrival of incoming trains and their contents?

A. It does.

1092 Q. Does that book cover the date of February 22nd, 1914?

A. It does.

1093 Q. At what page?

A. Page 139.

1094 Q. How many pages are there in that book?
A. 197.
1095 Q. How many days does that cover approximately?
A. January 16th to March 19th.
1096 Q. 1914?
A. 1914.
1097 Q. Is that book a part of the permanent records of the station at Fremont of defendant company?
163 A. It is.
1098 Q. Referring to page 139 of that record, you may state whether or not there is any entry for C. & N. W. car #14466?
A. There is, third line from top of left side page.
1099 Q. Is that the original record of the arrival and of the contents of some train arriving at Fremont on February 22nd, 1914?
A. It is.
1100 Q. In whose custody is that record?
A. The custody of the yard office.
1101 Q. I mean under whose general jurisdiction?
A. Under mine.
1102 Q. You know who made these entries on this page, page 139?
A. I do not.
1103 Q. How many men did you have under your jurisdiction at that time who might have participated in making those entries?
A. I can't give you that without going to the time-roll.
1104 Q. Were there more than one?
A. There were.
1105 Q. Do you know at the present time what particular clerk made the entries?
A. I do not.
1106 Q. Do you know whether or not the book is in the same condition now, so far as the entries for that date are concerned, as it was at the time the entries were made?
A. To the best of my knowledge it is.
1107 Q. Were the entries showing the arrival time of trains on that date and their contents made in the usual and ordinary course of business?
A. They were.
164 1108 Q. Calling your attention again to C. & N. W. car #14466, I will ask you to read from the record the entry in the book with reference to that car?

Mr. Brown: Objected to as incompetent, irrelevant and immaterial, and no proper foundation laid, but objection is not made because the book itself is not offered or because the witness is asked to read instead of offering the book.

(At trial:) Overruled. Exception.

Mr. Dressler: Defendant at this time as a substitute for offering in evidence the book asks the witness to read the entries, the statement of counsel for plaintiff making it unnecessary to offer in evidence the book itself.

1109 Q. Now Mr. Hicks, read the entry with reference to car C. & N. W. #14466?

A. "Train number Extra, conductor Wheelock, February 22nd, 1914, 6:40 A. M., C. & N. W. #14466, contents apples, billed from #6600, which is Omaha station, billed to #6676, known as Lincoln station. These numbers represent station names."

1110 Q. Explaining a little more fully what the record means with reference to this car, what does the record show as to when the train containing that car arrived at Fremont?

A. The record shows that train arrived at 6:40 A. M. February 22nd, 1914.

1111 Q. In charge of conductor Wheelock?

A. Yes.

1112 Q. Now handing you another book, I will ask you to state what that is. (Hands witness book.)

A. (Witness examining book.) This is the forwarding record of carloads and mechandise leaving Fremont.

165 1113 Q. Between what dates?

A. February 20th, to April 11th, 1914.

1114 Q. Is that a record of shipments forwarded from Fremont made up as described in your previous testimony?

A. It is.

1115 Q. How many pages are there in this record?

A. 200.

1116 Q. Is that book a part of the permanent records of Fremont station?

A. It is.

1117 Q. Who made the entries in that book, if you know?

A. The yard clerk, name unknown.

1118 Q. Is that book made up under your general supervision as agent?

A. It is.

1119 Q. Is the clerk who made the entries someone in your employ as agent?

A. He is.

1120 Q. Now, referring to page 8, of that book under what date are the entries on that page made?

A. February 23, 1914.

1121 Q. What day of the week was February 23rd, if you know?

A. Monday.

1122 Q. What day of the week was February 22nd, 1914?

A. Sunday.

1123 Q. Are the entries appearing on page 8 in the same condition now as they were at the time the entries were made?

A. To the best of my knowledge, yes.

1124 Q. Were those entries made in the usual and ordinary course of business?

A. They were.

166 1125 Q. State whether or not those entries constituted the original record of outgoing trains from Fremont station?

A. They are.

1126 Q. Referring again to page 8 of that record, state whether or not there is any mention made of C. & N. W. car #14466?

A. There is, seventh line from top of left of page 8.

1127 Q. Now, you may read from the record the data with reference to that car.

Mr. Brown: Objected to as incompetant, irrelevant and immaterial, and no sufficient foundation laid, but no objection is made because the book is not produced and the witness asked to read instead of producing the book.

(At trial:) Overruled. Exception.

A. "Date February 23rd, 1914, train #43, conductor Mystrik, time 3:15 A. M., seventh line, car #14466, contents apples, billed from #6600, Omaha Station, to #6676, known as Lincoln station."

1128 Q. Is that record which you have just read the record of the departure of some train from Fremont station?

A. It is the record of train #43.

1129 Q. That shows, does it, that that train contained that car and departed from Fremont station at what time in the morning?

A. 3:15.

1130 Q. A. M.?

A. Yes, February 23rd.

1131 Q. 1914?

A. 1914.

1132 Q. That's a train running between Fremont and Lincoln?

A. Regular scheduled train between Fremont and Lincoln.

167 1133 Q. What kind of a car is C. & N. W. car #14466, that is, whether box, refrigerator, coal or what?

A. From the number it would indicate it was a refrigerator.

1134 Q. The different classes of cars are numbered in a certain way so the number denotes the character of the car?

A. They are numbered in a certain series so that we know the kind of car they are by the number, as a usual thing. Not foreign cars, however.

1135 Q. C. & N. W. is a system car?

A. Yes.

1136 Q. I hand you another book and I will ask you to state what that is. (Handing witness book.)

A. (Witness examining book.) This is a record of way bills forwarded.

1137 Q. From where to where?

A. From Fremont to various stations.

1138 Q. Way bills for what?

A. This is for carload shipments.

1139 Q. Does that record contain also heater way bills?

A. It does.

1140 Q. Who makes up this way bill record?

A. The bill clerk as a usual thing.

1141 Q. Is he a clerk employed under your supervision as agent?

A. He is.

142 Q. When is that record made up with reference to the time various way bills are prepared?
. At the time the shipments are made.
143 Q. What is the character of that record, that is, whether tter-press copy, original writing or what?
. Letter-press copy of original writing.
1144 Q. So the records in this book are impression copies made from original way bills?
A. Yes sir.
145 Q. Referring now to page 104 of that record, you may e whether or not the entries appearing on that page are in the e condition as they were at the time they were made?
. Yes sir.
146 Q. Are they or not?
. They are.
147 Q. Referring again to that page of the record, you may e whether or not you find any reference to C. & N. W. car 4466?
. I do.
148 Q. What do you find with respect to that car on that page?

Ir. Brown: Objected to as incompetent, irrelevant and imma-l, no proper foundation laid, but no objection is made because witness is asked to make the statement rather than to produce book.
At trial:) Overruled. Exception.

. I find "February 22nd, 1914, way bill #2100, reading from mont to Lincoln, Nebraska, C. & N. W. #14466, consignor agent, signee agent, heater #797, $20.00 advance charges."
149 Q. Explaining a little more fully what the record shows, t was done with heater #797 with reference to car #14466?
. It was supposed to have been placed in car C. & N. W. 4466.
150 Q. That is, the record you have before you shows that heater 97 was placed in car #14466?
. Yes sir.
151 Q. On what date?
A. On February 22nd.
1152 Q. 1914?
A. 1914.
153 Q. What does the record of heater #797 before you indi-e with respect to whether or not it accompanied the shipment con-ned in car C. & N. W. #14466 between Fremont and Lincoln?
A. The record would indicate that it did so accompany the car.
1154 Q. For what purpose would the heater be placed in the car?

Mr. Brown: Objected to as calling for conclusion of the witness.
Mr. Brown (at trial): Objection withdrawn.

A. To preserve the contents of the car.
1155 Q. Against cold weather?
A. Against cold weather, severe cold weather.

1156 Q. Are you familiar with the conditions under which the Northwestern Railway as a general practice places heaters in shipments of perishable freight in refrigerator cars, in order to preserve them, at Fremont station?

A. Yes.

1157 Q. What is the fact then as to when heaters will be placed in perishable shipments being transported in refrigerator cars, so far as your practice at Fremont is concerned?

Mr. Brown: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid.

(At trial:) Overruled. Exception.

A. I am advised to use my own judgment.

1158 Q. Using your own judgment and basing your judgment on your experience as a station agent for a great many years and having the responsibility of determining when it is proper
170 and necessary to place heaters in refrigerator cars containing perishable freight at any time, what is the fact as to what the temperature must be to make the placing of such heaters in cars necessary?

Mr. Brown: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid.

(At trial:) Overruled. Exception.

A. My judgment would be around zero or below.

1159 Q. Do I understand then that in weather above zero it would or would not be necessary to protect perishable freight in refrigerator cars with heaters?

Mr. Brown: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid.

(At trial:) Overruled. Exception.

A. In order to preserve the shipment from freezing and using my judgment, I believe I would put them in for complete zero.

1160 Q. How cold would the temperature have to be before you would think it necessary to put heaters in the car, in a refrigerator car carrying perishable freight?

A. Anything below ten degrees above.

1161 Q. If the weather was as cold as ten above you would think it proper and a safe practice to put a heater in the car?

A. I would judge so.

1162 Q. Of course, for anything below that it would be necessary, would it not?

A. Yes.

1163 Q. How much cold will shipments carried in ordinary box cars stand without freezing and without heater protection?

Mr. Brown: Objected to as immaterial.

(At trial:) Overruled. Exception.

171 A. Supposed to carry about twenty above.

1164 Q. Then, as I understand it, refrigerator cars will pro-

ct shipments at least ten degrees lower temperature than box cars ill?

A. They are supposed to.

1165 Q. Is that opinion of yours based upon your experience as station agent in protecting perishable freight in that way?

A. Information given by others and also my own observations.

1166 Q. During your course of duty as a station agent?

A. Yes.

Cross-examination.

By Mr. Brown:

1167 Q. Mr. Hicks, what is there on the page before you from which you testified relative to the weather that indicates that the heater was sent with the car to Lincoln?

A. The nature of the way bill, the way in which it is written up.

1168 Q. What is there about that way bill in the way in which it is written up that indicates that a heater accompanied the car to Lincoln?

A. It shows from and to, car number in which placed and heater number with charges.

1169 Q. Now the fact that that indicates there was a heater put in this car, C. & N. W. #14466 at Fremont, Nebraska, this same fact would indicate there was no heater in the car when it arrived at Fremont, wouldn't it?

A. It would indicate that there was not. Occasionally there are two heaters put in the car,—not in this car.

1170 Q. Now Mr. Hicks, all you know relative to any heater being placed in the car is simply the information that you have from the records from which you testify?

A. That's all.

1171 Q. All the information that you have relative to the arrival of car #14466, C. & N. W. and of its departure is from the record that you have before you?

A. That's all.

1172 Q. And you have no way of knowing personally whether the record relative to the arrival of the car is correct, have you?

A. No personal knowledge.

1173 Q. And you have no personal knowledge as to whether the record of the departure of the car is correct, have you?

A. No personal knowledge.

1174 Q. You have no personal knowledge as to whether the record relative to the heater being placed in this car is correct?

A. No personal knowledge.

Redirect examination.

By Mr. Dressler:

1175 Q. All the records you have testified from are the original records of the transaction they mention and are made in the usual course of business?

A. They are.
1176 Q. Where are the men who made them, if you know.
A. I don't know.
1177 Q. All the entries and the records referred to were made by a clerk under your supervision as agent?
A. Yes sir.
173 1178 Q. Now do you have any other record, Mr. Hicks, in nection with heater #797, during the month of February, 1914?
A. I have.
1179 Q. What record do you have?
A. "In" record, a monthly abstract of way bills received, form 25A.
1180 Q. Does that record indicate whether or not any heaters were received back to Fremont from Lincoln station during the month of February, 1914?
A. It does.
1181 Q. Do you find any entry in that record with respect to heater #797?
A. I do.
1182 Q. What do you find?

Mr. Brown: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid, but we do not object because the witness is asked to state what the record contains rather than produce the book.
(At trial:) Overruled. Exception.

1183 Q. Do you have the book before you?
A. I do.
1184 Q. Now read from the book any record which you have concerning heater #797 after February 22nd, 1914?

Mr. Brown: Objected to as incompetent, irrelevant, and immaterial, no proper foundation laid, but objection is not made because the witness is asked to read from the book rather than to produce the book.
(At trial:) Overruled. Exception.

A. "Sheet #12, Lincoln to Fremont, February 27th, way bill #2623, heater #797, from Lincoln to Fremont."
1185 Q. State whether or not that is the record of the
174 return of that heater, #797, from Lincoln to Fremont?
A. That's the first record of its return after February 22nd.
1186 Q. 1914?
A. 1914.

Recross-examination.

By Mr. Brown:

1187 Q. Mr. Hicks, you have no personal knowledge of the facts contained in the record from which you have just read?
A. I have none.

Redirect examination.

By Mr. Dressler:

1188 Q. Was the record from which you have just read made in
he usual and ordinary course of business?
A. Yes sir.
1189 Q. Is it in the same condition now as it was at the time it
as made, so far as this heater is concerned?
A. As far as I know.
1190 Q. It appears to be, does it?
A. The appearance is the same.

Witness excused.

75 Mr. Dressler: The defendant now offers to read the deposition of Ernest Hahn, taken at the same time and place.
No objection.
Deposition read by Mr. Dressler as follows:

ERNEST HAHN, being by me first duly examined, cautioned and olemnly sworn, testified as follows:

Examination by Mr. Dressler:

1191 Q. What are your initials, Mr. Hahn?
A. Ernest is all I use.
1192 Q. Where do you live?
A. Fremont.
1193 Q. What is your business?
A. County Treasurer.
1194 Q. Have you anything to do with the taking of weather observations?
A. I have.
1195 Q. For whom do you make those observations?
A. For Mr. Loveland of Lincoln, Director for this section.
1196 Q. The observations are made for the Government?
A. Yes.
1197 Q. Of the United States?
A. Of the United States.
1198 Q. Do you keep a record of weather conditions and temperatures for the various days?
A. I do.
1199 Q. Do you have any such record for February 22nd, and 23rd, 1914?
A. I do.
1200 Q. What does the record show with respect to the tem-
176 peratures on those days, that is, the hourly records?
A. I don't have them hourly. I have just the maximum and minimum.
1201 Q. What does the record show with respect to the maximum and minimum temperatures on February 22nd, 1914, at Fremont, Nebraska?

Mr. Brown: Objected to as immaterial, no proper foundation laid.
(At trial:) Overruled. Exception.

1202 Q. You took the observation of the maximum and minimum temperatures on that day?
A. I did.
1203 Q. Did you make the record personally?
A. Yes sir.
1204 Q. Do you have it before you?
A. I have.
1205 Q. Is it a record which is required to be kept by the Government?
A. Yes.
1206 Q. Are you required to keep the record, that is, to preserve it as a part of the Government records?
A. Yes sir.
1207 Q. Is it possible to take the original record of these facts from your possession to attach them to a deposition?
A. I couldn't do that.
1208 Q. You may tell us from reading from your official record what the maximum and minimum temperatures were on February 22nd, 1914?
A. Maximum was 30 above zero, minimum was five above.
1209 Q. What were the temperatures, maximum and minimum, for February 23rd, 1914?
177 A. Maximum ten above, minimum one below zero.
1210 Q. Does the record show the precipitation during those days?
A. It does.
1211 Q. What was the precipitation and of what character on February 22nd, 1914?
A. One inch of snow.
1212 Q. What was the precipitation and of what character at Fremont on February 23rd, 1914?
A. Eight inches of snow.

Cross-examination.

By Mr. Brown:

1213 Q. I believe you say, Mr. Hahn, you have no record o hourly temperatures but just maximum and minimum?
A. That means from six o'clock in the evening to the followin evening at six o'clock.
1214 Q. Then the record of the maximum and minimum tha you gave for February 22nd, extends over what period?
A. Extends from the evening of the 21st at six o'clock until th evening of the 22nd at six o'clock.
1215 Q. Then your maximum and minimum for the 23rd e tends from six o'clock in the evening of February 22nd, until s o'clock in the evening of February 23rd?
A. Yes.

Redirect examination.

By Mr. Dressler:

1216 Q. You may state what the maximum and minimum temperature was at Fremont on February 21st, 1914?
A. Maximum forty above, minimum twenty-five above.

178 Witness excused.

STATE OF NEBRASKA,
County of Dodge, ss:

I, Florence E. Maple, a Notary Public within and for said County and State, hereby certify that the foregoing depositions were taken by me in shorthand and transcribed on the typewriter in accordance with the foregoing stipulation.

In testimony whereof, I have hereunto set my hand and notarial seal this 14th day of November, A. D. 1917.

(Signed) FLORENCE E. MAPLE,
[SEAL.] *Notary Public.*

My Commission expires Sep. 7, 1920.

Fees, $7.50 paid by Defendant.

179 Mr. C. H. DEAN, having been previously sworn herein, was recalled on behalf of the defendant and testified as follows:

Examination-in-chief.

By Mr. Dressler:

1217 Q. Have you the time of the arrival of the train from Fremont to Lincoln, in which this car #14466 was contained?
A. Yes, all I can tell you it is train #43, due here at 5:30 in the morning.
1218 Q. Would the record indicate?
A. No, this *this* is just the time we took the train, just for notification and disposition of the train.
1219 Q. Do your records show this car from Fremont came in train #43?
A. Yes sir.
1220 Q. February 24th?
A. The morning of February 23rd.
1221 Q. At what time?
A. The train registers are sent to the Trainmaster's office so we don't have that.
1222 Q. About what time?
A. 5:30 at that time,—Oh, I would say at 9 o'clock in the morning; I would be safe to say it was in there some place.

No Cross-examination.

Witness excused.

Defendant rests.
Plaintiff rests.

180 Mr. Dressler: The defendant moves the court, at the close of the testimony, to instruct the jury to return a verdict for the defendant, on the first and second causes of action, for the reason that as to those causes of action the suit is against this defendant as a connecting carrier only; and there is no evidence of the condition of either of the shipments at the time the same were received by the defendant.

Defendant further moves the court to instruct the jury to return a verdict for the defendant as to the third cause of action for the reason that there is no evidence sufficient to justify a verdict against the defendant on the ground that it was negligent in the handling of said shipment.

Overruled. Exception.

The hour of adjournment having arrived a recess was taken until tomorrow (Saturday) morning at 9:00 o'clock, February 16th, 1918.

9:00 A. M. Saturday, February 16th, 1918, court met pursuant to adjournment of yesterday and trial proceeded.

Mr. Brown: The plaintiff asks leave to withdraw its rest and put in additional evidence.

Court: Leave is granted; you may proceed.

Mr. C. C. WHITNACK, having been previously sworn herein was recalled and testified as follows:

181 Examination-in-chief.

By Mr. Brown:

1223 Q. Mr. Whitnack, what element of expenses entered into these apples that were purchased in New York, the two cars that are in question here?

Mr. Dressler: Objects as irrelevant, immaterial and attempting to fix the value of the shipment in violation of the express terms of the bill of lading as a basis for the opinion.

Overruled. Exception.

A. There was the expense of the salary of the man buying and the salary of the employees back there, and a certain amount of overhead expense which I estimated approximately at $5 per car, which includes telegrams, telephones and various items of that nature.

1224 Q. Now in getting at and making the estimate of the expenses of the purchase of these apples, aside from the price paid to each of the farmers; I will ask you Mr. Whitnack, did you take into consideration just one car, or the total amount you purchased back there?

A. The total amount of the 82 cars.

1225 Q. What is the fact whether you purchased these apples at a less price by sending a man there than you could have purchased them simply by correspondence?

A. We did.

1226 Q. We did what?

A. Purchased them for less money by having a man on the ground dealing directly with the groves.

1227 Q. Now you may state, Mr. Whitnack, the expense to you in New York for each of the cars of apples over and above the cost of 50¢ to 65¢ per hundred that was paid to the farmers?

182 Mr. Dressler: Objects for the reason that it is an attempt to fix the value in violation of the express terms of the bill of lading.

Court: I think I am still of the opinion that it is not what they cost, but what the market value was; it may be the same thing, but I think this would have some bearing and I think it is the reasonable market value at that place, not what they cost. Overruled. Exception.

A. After figuring it up it amounts to $18 and a few cents per car.

Mr. Dressler: Moved to strike out the answer as a conclusion of the witness and not based on the facts detailed to the jury.

Sustained. Exception.

1228 Q. You may state the items that you took into consideration in arriving at the cost of each car and what those items are?

A. I first took the item of salary and commission of Mr. Pickering, $225 per month, amounting to $450, for the two months he was gone, and a few days over two months, and his miscellaneous personal expenses $350; labor expended by Mr. Pickering in New York State was $300; overhead expenses I estimated at $5 per car; I can't itemize that because it is an endless job.

(Court:)

1229 Q. What do you mean by overhead?

A. Telephones and telegrams, Mr. Pickering sends all his telegrams collect and they are paid at this end, and I would estimate that as an average of about $5 per car.

1230 Q. Based upon your experience?

A. Yes sir.

183 (Witness continuing:) That makes a total of $1,500 for a total of 82 cars, or an average of $18 and some cents per car.

(Court:)

1231 Q. Now that is in addition to the cost of the apples?
A. That is in addition to the price paid the growers.
1232 Q. Was that the price paid for the apples in the car or in the field?
A. It was paid f. o. b. cars and the farmers delivered them to the cars.
1233 Q. So the price given would be the cost of the apples in the car?
A. At the car, we had to furnish our own men to put them in.
1234 Q. What is the expense as overhead?
A. They had to furnish the car into place and the farmers simply furnished the apples at the car door.

(Mr. Brown:)

1235 Q. The $18 is the amount you paid in addition to buying the apples?
A. Yes sir.
1236 Q. You testified relative to this S. F. R. D. car sent to Grand Island, $165 for this and $65 from the Union Pacific and $100 from the man that purchased it at Grand Island, was that the net or the gross amount that you received from those apples?

Mr. Dressler: Objects as irrelevant and immaterial.
Overruled. Exception.

A. It is what we call the net amount for the apples, but out of that we had to pay the freight charges.
1237 Q. How much were those?
184 A. $31.73.
1238 Q. Was there any other expenses that had to be paid out of that?
A. Railroad fare and hotel bills of a man to Grand Island and back $5.88.
1239 Q. How much of a total expense would that be, the two items?
A. I didn't total it, $37.61.
1240 Q. What did that leave that you received out of the apples after these expenses were paid?
A. $127.39.

Cross-examination.

By Mr. Dressler:

1241 Q. Of course, this $37.61 on this car that went to Grand Island, that was expense by reason of the fact that you made a new shipment of that over the Union Pacific wasn't it?
A. It was necessitated by the fact—— (Interrupted.)
1242 Q. Just answer the question.
A. That isn't the way I figure it.
(Question repeated.)

1243 Q. Of course, this $37.61 on this car that went to Grand Island, that was expense by reason of the fact that you made a new shipment of that over the Union Pacific wasn't it?

Court: Answer yes or no, any explanation will come later.

A. I would say yes in that case.

1244 Q. Of course, you don't know what Mr. Pickering paid for the apples back there do you, as he testified yesterday?

A. We can't tell exactly what he paid for these apples be-
185 cause he would buy from 35 to 40 different farmers, and he paid different prices from 50¢ to 70¢ per hundred.

1245 Q. I believe your statement yesterday was that Mr. Pickering didn't make any report to you of the number of hundredweight and the prices he paid?

A. No, he did not.

1246 Q. You just furnished him in chunks the money of $1,000, etc., and he paid it out?

A. He just furnished an invoice of the approximate price.

1247 Q. You don't know what he spent the money for except that you got some apples?

A. We had a pretty good idea.

1248 Q. You wouldn't know before you went back there would you?

A. I guess we did or we wouldn't have kept him back there for two months.

Redirect examination.

By Mr. Brown:

1249 Q. Mr. Whitnack, why were these apples sent to Grand Island that were shipped out over the Union Pacific?

Mr. Dressler: Objects as irrelevant, immaterial and no proper basis whatever for determining the liability in this case.

Overruled. Exception.

A. They were shipped at the request of the purchaser.

1250 Q. Yes, but why were they sold at Grand Island rather than here and with the expense of the railroad fare?

Mr. Dressler: Objects as irrelevant, immaterial, and no
186 proper basis whatever for determining the liability in this case.

Overruled. Exception.

A. They were unmerchantable and we couldn't sell them to legitimate merchants so we happened to get hold of one of the hucksters and sold the car to him at a low price and he decided he wanted them at Grand Island, so we billed them to Grand Island at his request.

Recross-examination.

By Mr. Dressler:

1251 Q. You got $65 out of the Union Pacific on that car too?
A. Yes sir.
1252 Q. That was on the theory that there was some loss?
A. Some stolen; the car was robbed in transit, at Central City.
1253 Q. As a matter of fact your man sold some out of that car at that place didn't he?

Mr. Brown: Objects as not cross-examination.
Overruled. Exception.

A. Not to my knowledge.
1254 Q. And he unloaded some didn't he?
A. [illegible] my knowledge.
1255 Q. [illegible] hat is the fact whether or not the car was found open at Ce[illegible]y?
A. I d[illegible] know a thing about it.
1256 Q. Isn't it a fact that you made your claim against the Union Pacific on the theory that $65 worth of apples had been hoisted out through the ventilator or roof?
A. I don't recall on what basis; it was a shortage claim is
187 all I recollect, and they paid it.
1257 Q. The car was unsalable when it left Lincoln you say?
A. I did not.
1258 Q. You said it was unmerchantable?
A. I said I sold it.
1259 Q. Did you say it was unmerchantable?
A. I said it was unmerchantable to sell to merchants.

Witness excused.

Plaintiff rests.
Defendant rests.

188 In the District Court of Lancaster County, State of Nebraska.

60–292.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Defendant.

Order.

The defendant herein having within the time heretofore allowed by the Court for that purpose, reduced to writing Bill of Exceptions, all of the evidence and testimony adduced or offered on the trial of

the above-mentioned cause, all of the objections to the admission of said evidence and testimony, with the grounds therefor, all of the rulings of the Court on such objections, together with all of the exceptions to such rulings made and taken at the time, and having served the same upon the attorneys for the Plaintiff for examination and amendment, as required by law, and the same being now here before me, the undersigned Judge, before whom said cause was tried, on motion of the attorneys for the Defendant that the same may be settled, allowed, signed, sealed and made a part of the record in said cause in said court:

Now, therefore, I do hereby certify that this Bill of Exceptions contains all of the evidence and testimony adduced or offered on the trial of said cause, all of the objections thereto, with the grounds therefor, all the rulings of the court on such objections, together with all of the exceptions to such rulings made and taken at the time;

And I do hereby order that said Bill of Exceptions be now allowed, settled, signed, sealed and made a part of the record in said cause in said court.

Done at Lincoln, Nebraska, this 25th day of March, 1918.

W. M. MORNING,
District Judge.

189 I, J. S. Baer, Clerk of the District Court of Lancaster County, Nebraska, Third Judicial District of Nebraska, do hereby certify that this is the original Bill of Exceptions filed in the office of said Clerk in the case of C. C. Whitnack Produce Company, Plaintiff, vs. Chicago & Northwestern Railway Company, a corporation, Defendant, tried at the January, A. D. 1918, Term of said Court.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Court this 25 day of March, A. D. 1918.

[Seal of District Court, Lancaster County, Nebraska.]

J. S. BAER,
Clerk of the District Court,
By W. C. BURCHAM,
Deputy.

I hereby certify that the foregoing transcript contains all of the evidence adduced or offered on the trial of the above entitled case, tried at the January, A. D. 1918, Term of the District Court of Lancaster County, Nebraska.

MINOR S. BACON,
Official Reporter.

Reporter's Fees: $57.00.
Paid by C. & N. W. Ry. Co.
MINOR S. BACON.

[Endorsed:] 20643. Whitnack Produce Co. v. C. & N. W. R. Co. Bill of Exceptions. Supreme Court of Nebraska. Filed May 3, 1918. H. C. Lindsay, Clerk.

[Endorsed:] 20643. C. C. Whitnack Produce Co. v. C. & N. W. Ry. Co. Supreme Court of Nebraska. Filed May 3, 1918. H. C. Lindsay, Clerk.

1 No. 20643.

C. C. WHITNACK PRODUCE CO.

v.

CHICAGO & N. W. R. CO.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol in the City of Lincoln, in said State, on the 5th Day of January, 1920.

Present:

Hon. Andrew M. Morrissey, Chief Justice.
Hon. Charles B. Letton, Judge.
Hon. William B. Rose, Judge.
Hon. James R. Dean, Judge.
Hon. Chester H. Aldrich, Judge.
Hon. George A. Day, Judge.
Hon. Leonard A. Flansburg, Judge.

Attest:
H. C. LINDSAY,
Clerk.

Be it remembered, that on the 3d day of May, 1918, there was filed in the office of the Clerk of said Supreme Court a certain Præcipe, in the words and figures following, to-wit:

2 In the Supreme Court of Nebraska.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Præcipe.

To the Clerk of said Court:

This is an appeal from the District Court of Lancaster County from a judgment in favor of plaintiff and against the defendant for Four Hundred Fifty-two and no/100 Dollars ($452.00), rendered on the 16th day of February, 1918. In the District Court C. C. Whitnack Produce Company was plaintiff and in this court is appellee, and in the District Court, Chicago and North Western Railway Company was defendant and in this court is appellant.

WYMER DRESSLER,
Attorneys for Appellant.

Endorsed: 20643. Whitnack Produce Co. v. C. & N. W. R. Co. Præcipe. Supreme Court of Nebraska. Filed May 3, 1918. H. C. Lindsay, Clerk.

3 And on the same day there was filed in the office of the Clerk of said Supreme Court the following Transcript and Bill of Exceptions:

4 And afterwards, to-wit, on the 4th day of December, 1919, the following, among other proceedings, were had and done in said Supreme Court, to-wit:

5 Supreme Court of Nebraska, September Term, A. D. 1919.

Dec. 4.

The following causes were argued by counsel and submitted to the Court:

* * * * * * *

No. 20643.

C. C. WHITNACK PRODUCE CO.
v.
CHICAGO & N. W. R. CO.

Appeal from Lancaster County.

* * * * * * *

A. M. MORRISSEY,
Chief Justice.

6 And afterwards, to wit, on the 15th day of May, 1920, there was rendered by said court and entered of record upon the journal thereof, a certain Judgment, in the words and figures following, to wit:

7 Supreme Court of Nebraska, January Term, A. D. 1920.

May 15

No. 20643.

C. C. WHITNACK PRODUCE CO., Appellee,
v.
CHICAGO & N. W. R. CO., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to

the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed at the costs of appellant, taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Dean, J.

Day and Flansburg, JJ., not sitting.

A. M. MORRISSEY,
Chief Justice.

8 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to wit:

9 No. 20643.

C. C. WHITNACK PRODUCE CO.
v.
CHICAGO & N. W. R. CO.

Opinion.

Filed May 15, 1920.

1. When suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier the presumption is that they were in good condition when delivered to the terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession.

2. "The common law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack amendment of June 29, 1906 (34 St. at Large, p. 584, ch. 3591), to the act of February 4, 1887 (24 St. at Large, p. 379, ch. 104, Comp. St. 1913, sec. 8592), sec. 20, making the initial carrier of an interstate shipment liable for any loss, damage, or in-
9½ jury 'caused by it' or by any other carrier to which the shipment may be delivered." Cincinnati, N. O. & T. P. R. Co. v. Rankin, 36 Sup. Ct. Rep. 555.

10 DEAN, *J.:*

This suit is based, as alleged, on defendant's common law liability in the sum of $739.88 for damage said to have been sustained by the freezing of a part of each of three cars of apples while in possession

of defendant as a common carrier. Two cars were interstate shipments from points in New York to Lincoln and one car was an intrastate shipment from Omaha to Lincoln. It is alleged that the damage occurred as a direct result of the carelessness, negligence and wrongful conduct of defendant.

From a verdict and judgment thereon for $452 defendant appealed.

Of the two interstate shipments defendant was the terminal carrier, the cars having been transported by three or more intermediate carriers before being delivered it.

It is argued on the part of defendant that its liability, if any, as to the interstate shipments arises under and is subject to the provisions of the Carmack amendment of June 29, 1906, 34 St. at Large, p. 584, ch. 3591, and that in the event of loss, under the facts herein, the amendment in question supersedes the common law presumption that, if goods are received in good condition by the initial carrier and are damaged in transit, the loss occurred while they were in possession of the terminal carrier.

Under the authorities in like cases it seems that the burden is on plaintiff to show that the goods were in good condition when delivered to the initial carrier and that they were in damaged condition upon arrival at destination; and that the burden is on the
11 terminal carrier defendant to show that the injury did not result from any cause for which it was responsible. 10 C. J. p. 556, sec. 924. In section 925 at page 558 the text announces a rule that seems to be reasonable. It is there said: "Two reasons have been assigned for the rule. One reason is that the presumption is necessary to preserve the shipper's rights, since the carrier, and not he, has control of the goods and is in a much better position to prove their condition at the time it received them than is the owner. Another reason is that it is within the power of the carrier to protect itself from responsibility for loss or injury occurring prior to its reception of the property by an inspection of its condition at the transfer point; and that it will be presumed prima facie that if the shipment had not been in good order the carrier would have refused to receive it otherwise than as in bad order."

The weight of authority in this class of cases and the better rule appears to be that when suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier the presumption is that they were in good condition when delivered to the next or terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494.

12 In Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. Rep. 555, 60 L. ed. 1022, L. R. A. 1917A. 265, the court declared: "The common law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack amendment of June 29, 1906 (34 St. at Large, p. 584, ch. 3591), to the act of February 4,

1887 (24 St. at Large, p. 379, ch. 104, Comp. St. 1913, sec. 8592), sec. 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury 'caused by it' or by any other carrier to which the shipment may be delivered."

On the question of damages generally, as to all of the shipments, we conclude that the verdict is amply supported by the evidence. There are other assignments by defendant of alleged error respecting certain instructions given and instructions refused and also as to the admissibility of testimony. An examination of the assignments convinces us that defendant's substantial rights were not affected in the respects noted and that reversible error does not appear.

The judgment is

Affirmed.

Day and Flansburg, JJ., not sitting.

13 And afterwards, to wit, on the 18th day of June, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Rehearing, in the words and figures following to wit:

14 In the Supreme Court of the State of Nebraska.

No. 20643.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff and Appellee,

vs.

CHICAGO & NORTH WESTERN RAILWAY CO., Defendant and Appellant.

Motion for Rehearing.

Comes now appellant and moves the court that the opinion and judgment of the Supreme Court affirming the judgment of the District Court in this case be vacated and set aside and a rehearing granted for the following reasons:

1.

The court was in error in holding, as it does, that there is a presumption against the last carrier of an interstate shipment that the damage to the shipment occurred on its line, in the absence of affirmative proof.

2.

The liability in this case must be determined by the decisions of the Federal Court with respect to the common law, and the Supreme Court has disregarded that principle, but has decided according to its own views in violation of the decisions of the Supreme Court of the United States on the same subject.

3.

The court has failed to give due consideration to the facts in this case, because they clearly show:

1. That the evidence did not prove the shipments to be in good condition when delivered to the initial carriers, but on the contrary, the evidence tended to show that the shipments were in bad condition, and

2. The evidence shows conclusively that the appellee made a profit of about 300 per cent on the shipment and was not damaged in any respect when the invoice price of the shipment at point of loading is considered.

PAUL S. TOPPING,
15 WYMER DRESSLER,
Attorneys for Appellant.

Endorsed: No. 20643. C. C. Whitnack Produce Company, Plaintiff and Appellee, vs. Chicago & North Western Railway Co., Defendant and Appellant. Motion for Rehearing. Supreme Court of Nebraska. Filed Jun. 18, 1920. H. C. Lindsay, Clerk.

16 And afterwards, to-wit, on the 14th day of July, 1920, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

17 Supreme Court of Nebraska, January Term, A. D. 1920.

No. 20643.

C. C. WHITNACK PRODUCE CO., Appellee,

v.

CHICAGO & N. W. R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and same hereby is, overruled and a rehearing herein denied.

A. M. MORRISSEY,
Chief Justice.

18 And afterwards, to-wit, on the 17th day of July, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Motion, in the words and figures following, to-wit:

19 In the Supreme Court of the State of Nebraska.

No. 20643.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Motion for Stay of Mandate and Execution.

Comes now Chicago and North Western Railway Company and states to the Court that it intends to apply to the Supreme Court of the United States, within three Months from he date of the entry of final judgment in this case by the Supreme Court of Nebraska, for a writ of certiorari from the Supreme Court of the United States directed to the Supreme Court of Nebraska for the purpose of reviewing the decision of the Supreme Court of Nebraska holding that appellant is liable as delivering carrier for the whole damages to the shipment, on the theory that there is a common law presumption that the loss occurred on the line of the last carrier under the Interstate Commerce Act.

Appellant therefore moves the Court that no mandate issue in this case to the District Court of Lancaster County, Nebraska, and that no execution be levied under the judgment in this case, and that the Supreme Court of Nebraska will fix the amount of a bond to be filed by Appellant as a supersedeas bond, pending a final determination of said controversy by the Supreme Court of the United States.

Dated this 16th day of July, A. D. 1920.

WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Attorneys for Appellant.

Endorsed: No. 20643. In the Supreme Court of the State of Nebraska. C. C. Whitnack Produce Company, Plaintiff and Appellee, vs. Chicago and North Western Railway Company, Defendant and Appellant. Motion for Stay of Mandate and Execution. Wymer Dressler, Robert D. Neely, Paul S. Topping, Attorneys for Defendant. Supreme Court of Nebraska. Filed Jul. 17, 1920. H. C. Lindsay, Clerk.

20 And afterwards, to-wit, on the 20th day of July, 1920, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

21 Supreme Court of Nebraska, January Term, A. D. 1920.

July 20

No. 20643.

C. C. WHITNACK PRODUCE CO., Appellee,

v.

CHICAGO & N. W. R. CO., Appellant.

Appeal from the District Court, Lancaster County.

This cause came on to be heard upon the application and motion of Chicago & Northwestern Railway Company for a stay of the issuance of the mandate herein, and to fix a supersedeas bond pending proceedings in taking an appeal herein to the Supreme Court of the United States, and was submitted to the court; upon due consideration whereof, it is ordered that said requests be sustained. It is ordered that the issuance of mandate be stayed until the further order of this court and that supersedeas bond be fixed in the sum of fifteen hundred dollars.

A. M. MORRISSEY,
Chief Justice.

22 And afterwards, to wit, on the 27th day of July, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Supersedeas Bond, in the words and figures following, to wit:

23 In the Supreme Court of the State of Nebraska.

No. 20643.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Supersedeas Bond.

Know all men by these presents: That Chicago and North Western Railway Company as Principal, and National Surety Company, a corporation of the State of New York as Surety, are held and firmly bound unto C. C. Whitnack Produce Company, their successors and assigns, in the penal sum of Fifteen Hundred and no/100 Dollars

($1,500.00), for the payment whereof well and truly to be made unto the said C. C. Whitnack Produce Company, their successors or assigns, we bind ourselves jointly and severally firmly by these presents. Yet upon the following conditions:

That Whereas, Chicago and North Western Railway Company has given notice that it will make application to the Supreme Court of the United States for a Writ of Certiorari directed to the Supreme Court of Nebraska for the purpose of having the Supreme Court of the United States review the record and the proceedings in this case, and the Supreme Court of Nebraska has ordered the mandate withheld pending said application and further proceedings.

Now, therefore, if Chicago and North Western Railway Company shall make said application according to law and if the Supreme Court of the United States shall issue a Writ of Certiorari or other process for the purpose of reviewing the decision of the Supreme Court of Nebraska in this court and if the Supreme Court of the United States shall affirm said judgment and the Chicago and North Western Railway Company shall pay the same as so affirmed, then this obligation to be void, otherwise to remain in full force and effect.

Dated this 21st day of July, A. D. 1920.

24 CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
By WYMER DRESSLER,
Its Attorney.
NATIONAL SURETY COMPANY,
By WM. H. WHEELEN,
Its Attorney in Fact. [SEAL.]

The foregoing Supersedeas Bond and surety thereon are hereby approved this 27th day of July, 1920.

W. B. ROSE,
Acting Chief Justice of the Supreme Court.

Endorsed: No. 20643. In the Supreme Court of the State of Nebraska. C. C. Whitnack Produce Company, Plaintiff and Appellee, vs. Chicago and North Western —, Defendant and Appellant. Supersedeas Bond. Wymer Dressler, Attorney for Appellant. Supreme Court of Nebraska. Filed Jul. 27, 1920. H. C. Lindsay, Clerk.

25 SUPREME COURT, STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the above and foregoing is a true and correct transcript of Præcipe, Judgment of affirmance, Opinion, Motion for rehearing, Order overruling motion for rehearing, Motion for stay of execution pending appeal and to fix bond, Order staying Mandate and fixing supersedeas bond, supersedeas bond and approval thereof, with all endorsements thereon filed and entered in a cause pending in said court wherein C. C. Whitnack Produce Company, a co-partnership consisting of Charles C. Whitnack and John T.

Lyle, co-partners doing business under the firm name and style of C. C. Whitnack Produce Company, was plaintiff, and Chicago & Northwestern Railway Company, a corporation, was defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as aforesaid.

I further certify that the above and foregoing transcript and bill of exceptions are the original transcript and original bill of exceptions filed in this Court in said cause and, together with the said files and orders of this Court, constitute the whole of the record used by said Supreme Court and show all proceedings in said Court in said cause.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said Court, at the City of Lincoln, this 17th day of August, 1920.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk,
By P. F. GREENE,
Deputy.

(2166)

STATE OF NEBRASKA,
Lancaster County, ss:

I, H. C. Lindsay, Clerk of the Supreme Court within and for the State of Nebraska, do hereby certify that pages 1 to 23, inclusive, of the foregoing printed book are and comprise a full and complete copy of the original transcript filed in my office in a cause pending in said Supreme Court of Nebraska, wherein C. C. Whitnack Produce Company, a co-partnership, consisting of Charles C. Whitnack and John T. Lyle, co-partners doing business under the firm name and style of C. C. Whitnack Produce Company, was plaintiff and Chicago & Northwestern Railway Company, a corporation, was defendant, and that pages 24 to 135, inclusive, are a true and correct copy of the original bill of exceptions filed in said Supreme Court of Nebraska in said cause, and that pages 136 to 144, inclusive, are a true and correct transcript of the præcipe, judgment of affirmance, opinion, motion for rehearing, order overruling motion for rehearing, motion for stay of execution pending appeal and to fix bond, and approval thereof with all endorsements thereon filed and entered of record in said Supreme Court of Nebraska, and the same, together with the said copy of transcript and bill of exceptions constitute the whole of the record used by our said Supreme Court and show all proceedings in said Court in said cause as the same fully appears upon the records and files of said Court and now in my charge remaining as aforesaid.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said Court at the City of Lincoln, this 29th day of September, A. D. 1920.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk.

Return to Writ of Certiorari

UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the stipulation filed in said Supreme Court concerning the use of the printed record now on file with the Clerk of the Supreme Court of the United States in the case of C. C. Whitnack Produce Company v. Chicago & Northwestern Railway Company, No. 20643, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of the State of Nebraska, in the City of Lincoln, this 15th day of November, 1920.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

In the Supreme Court of the State of Nebraska.

No. 20643.

C. C. WHITNACK PRODUCE COMPANY, Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the Clerk of the Supreme Court of Nebraska may certify to the Supreme Court of the United States a copy of this stipulation as a return to the Writ of Certiorari issued by the Supreme Court of the United States addressed to the Supreme Court of Nebraska on the twenty-seventh day of October, 1920.

It is further stipulated and agreed that the printed record in this cause, which is now on file with the Clerk of the Supreme Court of the United States, may be used as the record upon which the Supreme Court of the United States will consider this cause in that court.

Dated this 1st day of November, A. D. 1020.

WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Attorneys for Appellant.
ELMER J. BURKETT,
HENRY H. WILSON,
Attorneys for Appellee.

Endorsed: 20643. In the Supreme Court of the State of Nebraska. C. C. Whitnack Produce Company, Plaintiff and Appellee, vs. Chicago and North Western Railway Company, Defendant and Appellant. Stipulation. Supreme Court of Nebraska. Filed Nov. 8, 1920. H. C. Lindsay, Clerk.

STATE OF NEBRASKA, *ss:*

Supreme Court.

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Stipulation, in the case of C. C. Whitnack Produce Co. vs. Chicago & Northwestern Railway Co. No. 20643, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be fixed the Seal of said Court, at the City of Lincoln, this 15th day of November, 1920.

[Seal of the Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

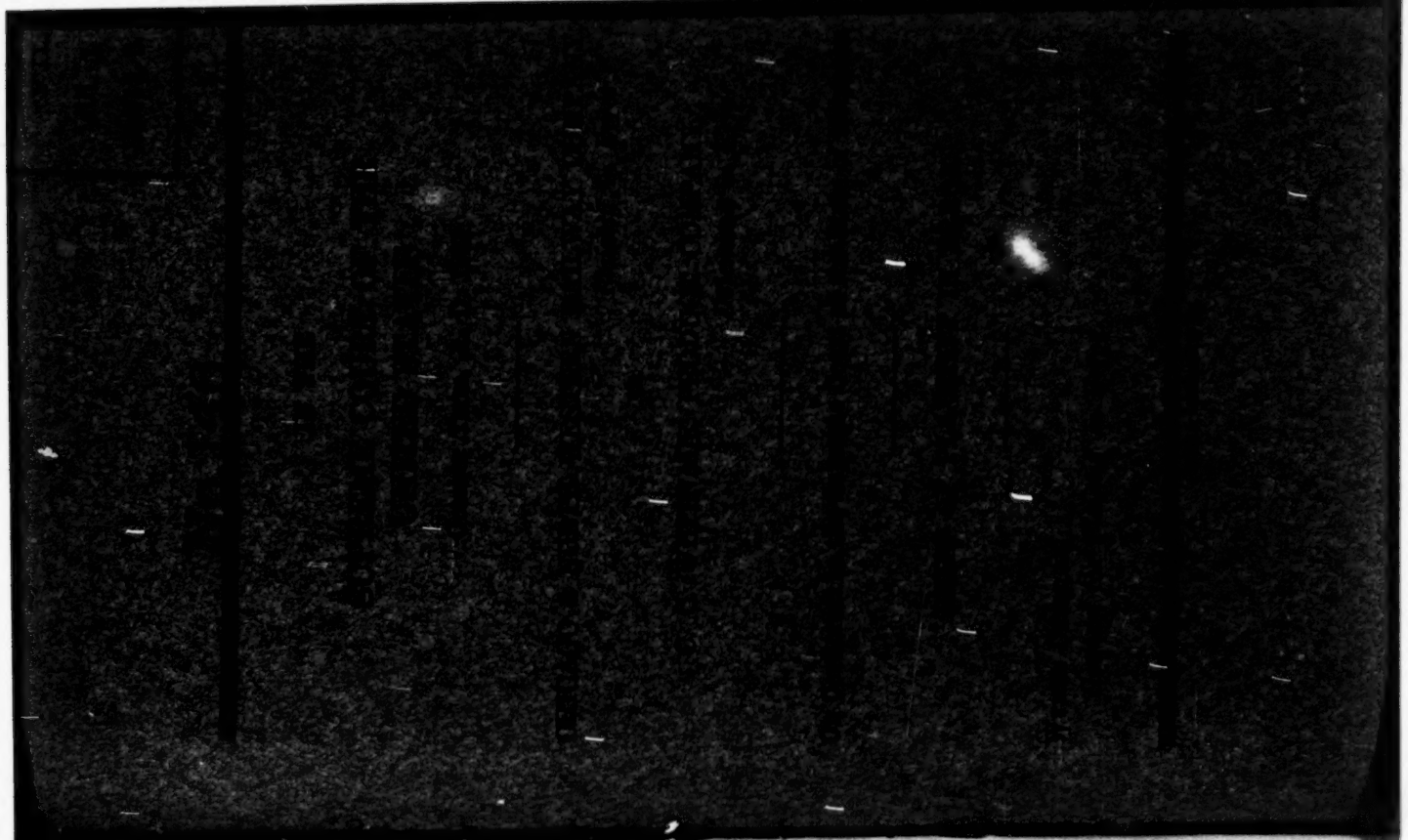
Being informed that there is now pending before you a suit in which Chicago & Northwestern Railway Company is appellant, and C. C. Whitnack Produce Company is appellee, No. 20643, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court of Lancaster County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,927. Supreme Court of the United States, October Term, 1920. No. 570. Chicago & North Western Railway Company vs. C. C. Whitnack Produce Company. Writ of certiorari.

[Endorsed:] File No. 27,927. Supreme Court U. S., October Term, 1920. Term No. 570. Chicago & North Western Railway Company vs. C. C. Whitnack Produce Company. Writ of certiorari and return. Filed Nov. 20, 1920.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1921

CHICAGO & NORTH WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

C. C. WHITNACK PRODUCE COMPANY,
Defendant in Error.

On Certiorari to the Supreme Court of the State of Nebraska

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

Proceedings on certiorari to reverse a judgment of the Supreme Court of Nebraska affirming the judgment of the District Court of Lancaster County, Nebraska, in favor of defendant in error and against plaintiff in error for $452.00 damages on account of the freezing of shipments of apples in interstate commerce.

Plaintiff in error was delivering carrier. The shipments originated on the New York Central Railroad and Niagara Gorge Railroad, respectively, in the Statae of New York, and were transported by those lines and connecting

carriers to Chicago where they were delivered to plaintiff in error, who transported them to destination.

Defendant in error offered evidence tending to prove that each of the shipments was delivered to the initial carrier in good condition and was delivered by plaintiff in error at destination in a frozen condition. Where the damage occurred was not proved. The State Court permitted defendant in error to recover upon the theory that there is a presumption that in the absence of proof as to where the damage occurred, that it occurred on the line of the last carrier.

Plaintiff in error moved for a directed verdict in its favor in the trial court on the ground that recovery could not be had against it as delivering carrier in the absence of affirmative proof that it caused the damage. This motion was denied. The trial court instructed the jury that there is a presumption that the loss occurred on the line of the last carrier and such presumption will entitle defendant in error to recover. This instruction was approved by the Supreme Court of Nebraska.

The issues made by the pleadings in the trial court were:

For a first cause of action plaintiff alleged that in the month of November, 1914, defendant received at Gibson, Indiana, car LS&MS No. 140156 containing apples consigned to the plaintiff or its agent, G. W. Pickering, at Lincoln, Nebraska, and that defendant carried the shipment over its lines to Lincoln, Nebraska, where plaintiff delivered or rebilled the same to Clarkson, Nebraska, over defendant's line. That between Gibson, Indiana, and Clarkson, Nebraska, the defendant carelessly permitted the apples to be-

come frozen and damaged to the plaintiff's total damages in the sum of $293.37.

For a second cause of action plaintiff alleged that during the month of November, 1914, S.F.R.D. car No. 8546 containing apples was received by defendant at Gibson, Indiana, for shipment to G. W. Pickering, plaintiff's agent, and that between Gibson, Indiana, and Lincoln, Nebraska, said apples were carelessly permitted to become frozen, and that when same were delivered to the plaintiff and its consignee at Grand Island, Nebraska (a new shipment from Lincoln on the Union Pacific), the plaintiff was unable to complete the sale thereof and was obliged to resell the same to the plaintiff's total damage in the sum of $218.36.

The answer of the defendant alleged as to plaintiff's first cause of action, that said shipment originated at Youngstown, New York, November 6, 1914, on the line of the Niagara Gorge Railroad Company, which was the initial carrier. That plaintiff's agent consumed from the sixth to the tenth of November in loading the car. That the Niagara Gorge Railroad Company delivered the shipment to the New York Central Railroad Company, which in turn, delivered the car to the Michigan Central Railroad Company, which in turn delivered the car to the Indiana Harbor Belt Railroad Company, which latter company delivered the car to the defendant at Proviso, Illinois, on November 15, 1914. That defendant transported the shipment from Proviso, Illinois, to Council Bluffs, Iowa, and delivered the same to the Union Pacific Railroad Company on the 18th of November, 1914. That thereafter, and on the 23rd of November, 1914, the Union Pacific again delivered the shipment to the defendant at Omaha, Nebraska, and the defendant transported the same to Lincoln, Nebraska, where it arrived on the 28th of November. The plaintiff reshipped

said car to Dodge, Nebraska, where it was partly unloaded and thereafter was shipped to Clarkson, Nebraska, where it arrived on the 5th of December, 1914. That said shipment constituted interstate commerce and that defendant handled the same as connecting and terminal carrier only. Otherwise the answer was a general denial.

The defendant's answer to the second count of plaintiff's petition alleged that said car originated at Ransomville, New York, on the line of the New York Central Railroad Company, who delivered the same to the Indiana Harbor Belt Railroad Company, and that the latter company on the 16th of November, 1914, delivered the car to the defendant at Proviso, Illinois. That defendant transported the same to Lincoln, Nebraska, and delivered the same to the plaintiff and that the plaintiff thereafter reshipped said car over the line of the Union Pacific from Lincoln to Grand Island, Nebraska; that defendant handled said car as a connecting carrier only; that said shipment was interstate and that the defendant was not guilty of any negligence.

The reply of the plaintiff admitted the truth of the allegations in defendant's answer as to the route over which said shipment moved and the carriers handling the same, and was otherwise a general denial.

Upon the issues thus joined a trial to a jury was had in the District Court of Lancaster County, Nebraska, on February 16, 1918, the jury returning a verdict for the plaintiff for $452.00, upon which judgment was entered.

At the trial of the case in the District Court of Lancaster County there was no evidence as to where any of the damage actually occurred and especially there was no evidence that it occurred on the line of the Chicago and North

Western Railway Company. The evidence showed that each of the shipments was transported at least five hundred miles before reaching the line of the Chicago and North Western Railway Company at Proviso, Illinois. The evidence showed that the cars were both sealed when delivered to the defendant at Proviso, Illinois. The evidence tended to show that the cars were delivered to the initial carrier in New York State, in each instance in good order, and the evidence shows that on arrival of each of the cars at Lincoln, Nebraska, the apples were more or less frozen.

ASSIGNMENT OF ERRORS

I.

The District Court of Lancaster County, Nebraska, erred in refusing to sustain the motion of plaintiff in error for a directed verdict in its favor.

The motion follows:

> "The defendant moves the court at the close of the testimony to instruct the jury to return a verdict for the defendant on the first and second causes of action, for the reason that as to those causes of action the suit is against this defendant as a connecting carrier only; and there is no evidence as to the condition of either of the shipments at the time same were received by the defendant." (Record, p. 130.)

II.

The District Court of Lancaster County erred in giving to the jury Instruction Number Two on his own motion.

The instruction follows:

> "You are instructed in your consideration of a shipment from the Staate of New York as follows: that if you find from the evidence the apples were in good

order and unfrozen when they were put in the cars in the State of New York, and received by the railroad at those points; and you further find from the evidence that they were received at Lincoln in a frozen condition, then there is a presumption that they were so frozen by reason of the negligence of the carrier; and you are further entitled to presume that this negligence occurred while the apples were being transported over the defendant's line, it being the last carrier. This would charge the defendant with liability for the damage, unless you find from the evidence that either the apples were frozen when loaded, or, were received by the defendant in a damaged condition." (Record, p. 13.)

III.

The District Court of Lancaster County erred in giving to the jury his Instruction Number Three.

The instruction follows:

"If you find from the evidence that the apples were shipped in good order and were frozen when they reached Lincoln, then the burden of proof is upon the defendant to show that they were in that condition at the time they were received upon the defendant's line, or, that the defendant exercised due diligence to protect them from freezing while in its possession, by using all ordinary and customary means to that end." (Record, p. 13.)

IV.

The Supreme Court of Nebraska erred in holding and deciding that there is a presumption as to interstate shipments that the loss occurred on the line of the last carrier.

See Opinion Supreme Court Nebraska. (Record, p. 138.)

BRIEF OF ARGUMENT

There is no common law presumption applied in Federal Courts that damage to an interstate shipment occurred on the line of the last carrier; on the contrary, Federal Courts hold that since the enactment of the Carmack Amendment to the Interstate Commerce Law, making the initial carrier liable for the entire transportation, that all such presumptions heretofore applied by state courts are superseded, and recovery against a connecting carrier can only be had by affirmatively showing that it caused the damage.

Boston & Maine Railroad vs. Hooker, 233 U. S. 97.
M. K. & T. Ry. Co. vs. Harris, 233 U. S. 412-420.
Adams Express Company vs. Croninger, 226 U. S. 491.
Charleston, etc., R. R. Co. vs. Varnville Furniture Co., 237 U. S. 597.
Henderson vs. Kansas City Southern Ry., 85 So. 625.

Liability of a carrier on account of interstate shipments is to be determined by the laws of the United States, the provisions of the bills of lading, and the common law as applied in Federal Courts. State laws and policies have no application.

N. Y. C. & H. R. Ry. Co. vs. Beaham, 242 U. S. 148.
United Metals Selling Company vs. Pryor, 243 Fed. 91 (C. C. A. 8th Circuit).
Southern Railroad Company vs. Prescott, 240 U. S. 362.
A. T. & S. F. Ry. vs. Harold, 241 U. S. 371.

ARGUMENT

The single question involved in this case is whether, since the enactment of the Carmack Amendment to the Interstate Commerce Act there is a presumption as to interstate shipments, that the loss occurred on the line of the last carrier, thereby enabling the plaintiff to make a prima facie case against the last carrier by showing that the shipment

was delivered to the initial carrier in good condition and was delivered at destination by the last carrier in a damaged condition.

The Supreme Court of Nebraska in its opinion in this case holds:

> "When suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier, the presumption is that they were in good condition when delivered to the terminal carrier. To overcome this presumption the burden is upon the defendant to prove that the goods were in a damaged condition when they came into its possession."

The Court further says:

> "Of the two interstate shipments defendant was the terminal carrier, because having been transported by three or more intermediate carriers before being delivered to it.
>
> "It is argued on the part of defendant that its liability, if any, as to the interstate shipments arises under and is subject to the provisions of the Carmack Amendment of June 29, 1906, 34 Statutes at Large, Page 584, Chapter 3591, and that in the event of loss, under the facts herein, the amendment in question supersedes the common law presumption that, if goods are received in good condition by the initial carrier, and are damaged in transit, the loss occurred while they were in possession of the terminal carrier.
>
> "Under the authorities in like cases it seems that the burden is on plaintiff to show that the goods were in good condition when delivered to the initial carrier and that they were in damaged condition upon arrival at

destination; and that the burden is on the terminal carrier, defendant, to show that the injury did not result from any cause for which it was responsible.

"The weight of authority in this class of cases and the better rule appears to be that when suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, when they came into possession of the initial carrier the presumption is that they were in good condition when delivered to the next or terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession."

We have searched the digest carefully and have discovered no decision by any federal court announcing the rule of common law which was applied by the trial court in this case and affirmed by the Supreme Court of Nebraska. On the other hand we believe that repeated decisions by the Supreme Court of the United States establish the rule that as to interstate commerce no such presumption is applicable in view of the act of Congress regulating interstate commerce, and particularly the Carmack Amendment thereto affording to shippers a complete remedy against the initial carrier for any damages arising out of interstate transportation.

In the case of *Charleston, etc., R. R. Co. vs. Varnville Furniture Company,* 237 U. S. 597, the rule applied by the trial court in this case was disapproved and destroyed. South Carolina had long adhered to the rule announced by the trial court in the case at bar, that where goods were shown to have been delivered to the initial carrier in good condition and thereafter transported over the lines of several carriers, and were delivered at destination by the last

carrier in a damaged condition, that it will be presumed the damage occurred on the line of the last carrier and that such presumption wil lsupport a liability. This common law policy of the South Carolina Caurt was affirmed by the Legislature of that State which enacted a statute, providing in substance, that the last carrier of such goods should be liable for the loss, unless within a specified time it disproved such liability by discovering and disclosing to the plaintiff the guilty carrier. It was contended by the railroad that the act of Congress had taken complete charge of the field of rights and remedies for damage to interstate shipments and that the Statute of South Carolina was therefore superseded by and in conflict with the Interstate Commerce Act, and void.

This Court says:

"The defendant contended that the law imposing the penalty was invalid under the Act to regulate commerce, especially section twenty, known as the Carmack Amendment.

"The defendant (Railway Company) received the goods from the Southern Railway Company and delivered them in damaged condition. Where the damage was done does not appear.

"It seems to follow from the decision in this case (the State Court's decision), that the terminal carrier is held for a loss anywhere along the line and for penalty, unless it proves that the property never came into possession, etc., or succeeds in shifting the loss within the forty days allowed.

"It is true that in the opinion of the Supreme Court (of the State) the judgment is spoken of as being for damage done to a shipment while in defendant's possession within this State, and it is said that the Statute limits liability to such damage. But in view of the rec-

ord, this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible, is itself in fault. The defendant happened to be the last carrier of the line, and in many states, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remains so until the latest moment when it could have been harmed. But, while this seems to have made its first appearance in the guise of a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience, calling on the last carrier to explain. * * * The rule is stated as a rule of policy in South Carolina, and the Statute makes it still more clearly so, since, with the limits that we have stated, it applies indifferently to any carrier in the line, if within the State, according to the accident of the plaintiff's demand. The case then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the State, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law.

"The South Carolina Law has been amended and enlarged in scope since that decision (Atlantic Coast Line vs. Mazursky, 216 U. S. 122), but it is less necessary to scrutinize those changes than to consider the modifications of the United States law. As it now stands, that law (U. S. law) requires the initial carrier to issue a through bill of lading and makes it liable for all damages anywhere on the route.

"As was said in M. K. & T. Ry. vs. Harris, 234 U. S. 412-420, the result of many recent cases, there cited, beginning with Adams Express Company vs. Croninger, 226 U. S. 491, and coming down through Boston & Maine R. R. vs. Hooker, 233 U. S. 97, is that the special regulations and policies of particular states upon the subject of the carriers' liability for loss or damage to

interstate shipments and the contract of carriers with respect thereto have been superseded.

"The South Carolina Act * * * extends the liability to losses on other roads in other jurisdictions and increases it by a fine difficult to escape. It overlaps the Federal Act in respect of the subjects, the grounds, and the extent of liability for loss."

This Court holds, therefore, that the so-called presumption which has been pronounced by the Supreme Court of Nebraska in the case at bar, is in effect a rule of substantive law conceived as a policy of the State which is in conflict with the supremacy of the National Law on the same subject, namely, the liability of carriers of interstate commerce, and that such rule is therefore inapplicable.

In *N. Y. C. & H. R. Ry. Co. vs. Beaham*, 242 U. S. 148, this court says:

"The transactions in question related to interstate commerce, consequent rights and liabilities depend upon acts of Congress, agreement between the parties and common-law principles accepted and enforced in Federal Courts."

In *Henderson vs. Kansas City Southern Railway Co.*, 85 So. 625, the Supreme Court of Louisiana, following the decision in the *Varnville Furniture case, supra*, says in the syllabus:

"The common-law rule that a delivering carrier of an interstate shipment shall be liable for injuries to freight delivered in a damaged condition on proof merely that the goods were delivered to the initial carrier, another railroad in another state, in good condition, and without proof that the damage or injury occurred on the line of the delivering carrier, has been superseded by the Carmack Amendment."

CONCLUSION

Therefore, since the rule of policy applied by the trial court and approved by the Supreme Court of Nebraska, holding the last carrier of an interstate shipment liable in the absence of proof that it caused the loss, conflicts with the national law on the same subject, the state policy must yield. On the state of the record, Plaintiff in Error was entitled to a directed verdict in its favor. As to the interstate shipments, instructions two and three given by the trial court were erroneous, for which reason the judgment of the Supreme Court of Nebraska should be reversed.

We respectfully so ask.

Respectfully submitted,

WYMER DRESSLER,
Counsel for Plaintiff in Error.

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General Number 27927.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 146.

OCTOBER TERM, A. D. 1921.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

C. C. WHITNACK PRODUCE COMPANY, DEFENDANT IN ERROR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

ELMER J. BURKETT,
HENRY H. WILSON,
ELMER W. BROWN,
RALPH P. WILSON,
Attorneys for Defendant in Error.

STATEMENT OF CASE.

Counsel for Plaintiff in Error has so fully stated the history of this case as to relieve us from any further statement.

ASSIGNMENT OF ERRORS.

The four assignments of error relied upon in this case raise only two propositions of law.

First. Is there at common law, a presumption that goods, delivered to the initial carrier in good condition and redelivered by the terminal carrier in a damaged condition, were damaged while in the possession of the terminal carrier?

Second. If this presumption exists at common law, was it abrogated by the Carmack Amendment?

COMMON LAW PRESUMPTION.

There are but few principles of the common law of evidence so well established and so universally enforced, as that goods delivered in good condition to the initial carrier and redelivered in a damaged condition by the terminal carrier, are presumed to have been damaged while in the possession of the latter. As illustrating the universality with which the courts have applied this presumption to this state of facts, we select from the hundreds of cases, the following, most of which are comparatively recent:

Alabama: *Southern Express Co.* v. *Sales*, 49 So. 392.

Arkansas: *St. L. I. M. & S. Ry. Co.*, 183 S. W. 176.
Delaware: *Klair* v. *Phil. B. & W. R. Co.*, 78 Atl. 1085.
Florida: *Atlantic Coast Line R. Co.* v. *Hine-Stephens Co.*, 60 So. 749.
Georgia: *Way* v. *Southern Ry. Co.*, 64 S. E. 1066.
Illinois: *Great-Western R. Co.* v. *McDonald*, 18 Ill. 172.
Indiana: *Nashville & St. L. Ry. Co.* v. *Johnson*, 109 S. E. 912.
Iowa: *Glassman* v. *Chicago, R. I. & P. Ry. Co.*, 147 N. W. 757.
Kentucky: *Chesapeake & O. Ry. Co.* v. *Williams*, 160 S. W. 769.
Louisiana: *Duvall* v. *Louisiana Western R. Co.*, 65 So. 104.
Maine: *Ross* v. *Maine Cent. R. Co.*, 96 Atl. 223.
Maryland: *New York & . Transf. Line* v. *Lewis Baer Co.*, 84 Atl. 251.
Massachusetts: *Bullock* v. *Boston & H. Despatch Co.*, 72 N. E. 256.
Minnesota: *Leo* v. *St. Paul, M. & M. Ry. Co.*, 15 N. W. 872.
Mississippi: *Jordan* v. *Mississippi Cent. R. Co.*, 65 So. 276.
Missouri: *Keithley* v. *Lusk*, 177 S. W. 756.
Nebraska: *Whitnack Produce Co.* v. *Chicago & N.-W. R. Co.*, 78 N. W. 177.
New Jersey: *Gude* v. *Pennsylvania R. Co.*, 71 Atl. 1128.
New York: *Hunt* v. *Michigan Southern R. Co.*, 37 N. Y. 162.
North Carolina: *Morganton Mfg. Co.* v. *Ohio R. & C. Ry. Co.*, 28 S. E. 474.
Oregon: *Lacey* v. *Oregon R. & Nav. Co.*, 128 Pac. 999.
Ohio: *Cleveland & C. R. Co.* v. *Barron-Boyle Co.*, 31 Oh. Cir. Ct. R. 142.
Oklahoma: *St. Louis & S. F. R. Co.* v. *Jamieson*, 95 Pac. 417.

Pennsylvania: *Vuille* v. *Pa. R. Co.*, 42 Pa. Super 567.
Rhode Island: *Podrat* v. *Narragansett Pier Co.*, 78 Atl. 1044.
South Carolina: *Eastover Mule & Horse Co.*, 83 S. E. 599.
South Dakota: *Dunlap* v. *Great-Northern R. Co.* 148 N. W. 529.
Tennessee: *Louisville & N. R. Co.* v. *Tenn. Brewing Co.*, 36 S. W. 392.
Texas: *Gulf C. & S. F. Ry. Co.* v. *King*, 174 S. W. 960.
Washington: *Shebel* v. *Oregon R. & N. Co.*, 98 Pac. 745.
West Virginia: *Williamsport Hw. Co.* v. *B. & O. R. Co.*, 77 S. E. 333.
Wisconsin: *Stolze* v. *Ann Arbor R. Co.*, 134 N. W. 376.

REASONS FOR THE RULE.

While the courts have been practically unanimous in their application of this presumption, they have not always given the same reasons in its support. Some courts in the application of this presumption, base it upon the more general presumption of continuity; that is to say, that when a state of acts is once shown to exist, it will be presumed that such state of facts continues to exist until the contrary is proven. Other courts in applying this presumption, have based it upon the still more general principle that when the evidence applicable to a certain state of facts is peculiarly in the possession or under the control of one of the parties to an action, in the absence of proof, those facts will be presumed against the party who has possession or control of the evidence. The rule itself is based upon the soundest principles of legal reasoning and is absolutely necessary to the protection of the shipper in a country

where commerce is so vast as it is with us, and where goods are carried such great distances over many connecting carriers.

In the case of *Dunlap* v. *Great Northern Ry. Co.*, 34 So. Dak. 320, 148 N. W. 529, the Supreme Court of South Dakota, discussing this presumption, says:

> "Under the generally recognized rule for establishing liability for negligence, it would be necessary before appellant could be held liable for the injury to these apples, for respondent to show that the apples were in an undamaged condition when they were delivered to appellant by the Chicago, Burlington & Quinck Company. But, owing to the exigencies that arise in this class of cases, an exception has been made to the general rule. The exception is that, where property has been placed in the hands of a common carrier for transportation in good order and condition, that condition is presumed to continue to exist until the contrary is shown; and, where such property has been transported by successive and connecting carriers and delivered to the consignee in a damaged condition, it will be presumed to have received the injury while in the possession of the last carrier. The reason for this rule is clearly stated by Johnson, J., in *Smith* v. *N. Y. C. Ry. Co.*, 43 Barb. (N. Y.) 225, in the following language:
>
> 'Unless this rule is to be applied to goods delivered to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company the injury happened. But give to such party

the benefit of the presumption that the goods he has delivered in good order in such case continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burden is then shifted upon the latter company of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make much more easily and readily than the converse can be proved by the owner. This is in perfect harmony with a well-settled rule of law, as an exception to the general rule. The general rule undoubtedly is that the burden of proof is always upon the party who asserts the existence of any fact which infers legal responsibility. But the exception is equally well established that in every case the *onus probandi* lies on the party who is interested to support his case by a particular fact which lies more particularly within his knowledge, or of which he must be supposed to be cognizant. If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. 1 Greenl. Ev. Par. 79, 1 Stark. Ev. 362-365. Wills on Circumstantial Ev. 183, 184. This applies in all civil cases. A familiar instance is the action to recover the penalty for the violation of the excise law. And it applies also in criminal cases in weighing the evidence, after slight evidence has been given, sufficient to raise the presumption that the alegations are true, in the absence of any evidence of the contrary. In this case, and all cases of like nature, I think it is enough for the owner to show that he deliv-

ered the property to the connecting road in good condition, and that the burden is then cast upon the company delivering the goods injured of proving that they were not injured in their possession, or that they came to their possession thus injured. This evidence in almost every case is all that the owner can possibly give, inasmuch as he is not supposed to accompany his property in the transit.'

And, again, in *Sheble* v. *Oregon R. & Navigation Co.*, 51 Wash. 359, 98 Pac. 745, it is said:

'This presumption becomes necessary to protect the shippers' rights and to save them from the necessity of making proof, which, under the circumstances, would be almost, if not entirely impossible for them to make; they having no jurisdiction or observation of the goods during the transit, while the care and custody and observation of the goods have been in the hands of the respective carriers.'

And to the same effect is *Laughlin, et al.*, v. *C. & N.-W. Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493, a leading case on this question.

The reason for the rule, then, is that the property being transported is continuously in the possession of, and under the jurisdiction of, the various carriers, and all the facts relative to the injury lie peculiarly within the knowledge of the carriers."

FEDERAL CASES RECOGNIZING THE BASES OF THIS PRESUMPTION.

While the Federal courts do not appear to have passed upon the application of this presumption to the state of facts involved herein, they have recognized in

many decisions, the general presumptions of which this specific presumption is but an application. In other words, the Federal courts have uniformly recognized the validity of the presumption of continuity and have recognized the presumption arisnig from the superior opportunity to produce the proof of a certain state of facts and have further recognized the presumption arising from a refusal of a party to an action to produce evidence in his possession.

PRESUMPTION AGAINST ONE WITHHOLDING EVIDENCE WITHIN HIS POWER TO PRODUCE.

In the case of *Kirby* v. *Tallmadge,* 160 U. S. 379, 16 Sup. Ct. 349, this court, speaking through Justice Brown, said:

> "It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand, and given their version of the facts. *McDonough* v. *O'Neil,* 113 Mass. 92; *Com.* v. *Webster,* 5 Cush. 295, 316. It is said by Mr. Starkie, in his work on evidence (volume 1, p. 54): 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'"

In the case of *The Bolton Castle,* 250 Fed. 403, it is said that:

> "The unexplained failure to produce evidence which is in the possession of the party raises a presumption that, if produced, it would not be favorable to the contention of the party possessing."

PRESUMPTION ARISING FROM OPPORTUNITY TO PROCURE EVIDENCE.

Where the evidence necessary to establish the existence or non-existence of alleged facts is peculiarly in the power of one party to an action, a presumption arises, in the absence of any evidence, against the party who has possession of the evidence.

In the case of *Selma, R. & D. Co.* v. *United States,* 139 U. S. 560, 11 Sup. Ct. 638, this court, speaking through Justice Harlan, said:

> "While the general rule is that the burden of proof is where the pleadings place it, namely, upon the party against whom judgment must go, if no evidence whatever is introduced, its application is often affected by circumstances. 'From the very nature of the question in dispute,' says Mr. Best, 'all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be asily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him or because there was a presump-

tion of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.' 1 Best, Ev. Par. 79; 2 Starkie, Ev. 589. The books of account kept by the Alabama & Tennessee Rivers Railroad Company, or some one connected with that corporation while it was serving the Confederate government, might throw light upon the question of payment. The presumption is that the plaintiff has possession of those books, and that, in connection with the evidence of those who kept them, they would disclose whether the original contractor had or had not been paid by the Confederate government out of the moneys of the United States which it appropriated. It did not produce them. And there is no finding inconsistent with the presumption that it was entirely within its power to show, if such were the fact, that its claim had not been paid by the Confederate government. So that the reasonable inference from the facts found—assuming that the burden of proof was upon the United States—is that the plaintiff's claim was not of the class for the payment of which congress legislated in 1877."

This presumption has been applied:

To the provisions for a ship:

The Emma F. Angell, 217 Fed. 311.

To negligence of common carier:

Galveston H. & S. A. R. Co. v. *Wallace*, 223 U. S. 481, 32 Sup. Ct. 205.

The E. M. Norton, 15 Fed. 686.

PRESUMPTION OF CONTINUITY.

Another presumption that includes the presumption against the terminal carrier is the presumption of continuity. When a certain state of facts or condition is once proven to have existed, it will be presumed that such state of facts or condition continues to exist until the contrary is proven. The presumption against the terminal carrier is nothing more than a specific application of this general presumption of continuity. In the case at bar when it was shown by the evidence that the apples were in good condition when delivered to the initial carrier, the presumption at once arise that they continued in that condition until the proof showed that they were in a different condition and this did not appear until they were delivered by the plaintiff in error, as the terminal carrier, at the Nebraska terminus. This general presumption of continuity is generally recognized by the Federal courts as a part of the common law. In the case of *Lazarus* v. *Phelps*, 156 U. S. 202, 15 Sup. Ct. 271, thsi court, speaking through Justice Brown on this subject, said:

> "The verdict and judgment in that case settled the fact that the defendant was in the use and occupation of said lands up to February 5, 1890,

and, in the absence of evidence to the contrary, such possession would be presumed to continue. *Brown* v. *King*, 5 Metc. (Mass.) 173; *Gray* v. *Finch*, 23 Conn. 495; *Currier* v. *Gale*, 9 Allen, 522; *Smith* v. *Hardy*, 36 Wis. 417; *Bayard* v. *Colefax*, 4 Wash. C. C. 38, Fed. Cas. No. 1,130."

This presumption of continuity has been applied:

To Domicile.

Mitchell v. *United States*, 21 Wall. 350.

To Ownership.

Fisher v. *Neil*, 6 Fed. 89.

To Mental Faculties.

Virginian Ry. Co. v. *Linkous*, 230 Fed. 88.

To Residence and Character.

United States v. *Deans*, 230 Fed. 957.

To Alienage.

Lehigh Valley Coal Co. v. *Wash. Co.*, 130 Fed. 42.

To Celibacy.

Texas & P. Ry. Co. v. *Lacey*, 185 Fed. 225.

To Insanity.

In re: *Kehler*, 159 Fed. 55.

To Condition of Barrels of Whisky.

Corbin & Co. v. *United States*, 181 Fed. 296.

While the Federal courts seem not to have had occasion to apply this presumption in the exact form involved in this case, yet that is certainly no evidence that it is not a part of the common law. It cannot be

assumed that merely because this court has never had occasion to apply this presumption in this particular form, that therefore, it does not exist at common law. Counsel seems to labor under the impression that the common law does not exist until this court has declared its existence. On the contrary, this court applies, but does not invent, common law doctrines. It has many times been held by this court that there is no Federal common law as distinguished from the common law existing in the several states. It is quite true that in certain classes of cases involving matters of general jurisprudence, where the common law is differently construed by different states, this court will follow its own view of the common law, but it is still the common law of the states that is recognized and enforced and not the common law of the United States as distinguished from that of the states.

The Federal courts must go to the same source for the common law to which the state courts resort and sound legal reasoning in the state courts will be equally sound in the Federal courts. It would be difficult to understand how this court could, in the face of the unanimity of the state decisions, find that there was no such presumption at common law. The presumption exists from the very nature of the transaction and the mere fact that this court has, as yet, had no occasion to apply the presumption in the particular form in which it was applied in this case, is wholly immaterial. The presumption is a part of the common law of the land

and as such, will be recognized and enforced by this court as soon as occasion arises.

In view of these numerous cases in the Federal courts recognizing all of the fundamental bases of the presumption here in controversy, we cannot doubt that this court will adopt and enforce the presumption against the termnial carrier as being but a concrete application of general principles well-settled by Federal jurisprudence. The presumption here involved is but a corollary of the general theorem involved in the presumptions already recognized and enforced. We shall, therefore, assume that this court will recognize as a part of the common law, the presumption that arises against the terminal carrier when the proof shows that the goods were delivered in good condition to the initial carrier and redelivered in a damaged condition by the terminal carrier.

PRESUMPTION NOT ABROGATED BY STATUTE.

Assuming, therefore, the existence of this presumption at common law, our next inquiry is, has it been abrogated or impaired by the Carmack Amendment? This brings us to a consideration of the purposes Congress had in view in the passage of the Carmack Amendment.

It is a general doctrine that the burden of loss as between the seller and purchaser, is determined by the point of delivery. Where goods are sold upon terms that are fulfilled by a delivery of the goods to the initial common carrier by the consignor, the burden of loss in

transit is, by the common law, thrown upon the consignee. He and he alone, at common law, has a right of action against the carrier for loss or damage. In this situation, the common law gave the consignee an available and fairly efficient remedy for his loss. The terminal carrier could be sued in the jurisdiction of the residence of the consignee and at common law, the presumption of loss or damage upon the delivering carrier, relieves him of the burden of showing at what point on the route and by what connecting carrier, the damage or loss was caused.

When, however, goods were sold upon terms that required the seller to deliver them F. O. B. at their destinuation, the burden of loss or damage in transit fell upon the seller and he had no adequate remedy at common law. If he sued the initial carrier, the burden was upon him to prove that the loss or damage was caused by that carrier. If he brought his action against the terminal carrier perhaps thousands of miles away, the expense and delay rendered the remedy very inefficient and often valueless. It is true that the common law gave the same remedy against the terminal carrier, to the seller if the burden of loss fell upon him, as to the purchaser when the burden of loss fell upon the latter, but the purchaser was enabled to bring his suit at home, while the seller was compelled to go into a distant jurisdiction. It was the general holding of the Federal courts that a through bill of lading would not put upon the initial carrier the burden of making good, losses occurring on connecting lines, but the state

courts were in hopeless conflict and confusion upon this point.

It was, therefore, to clear up this conflict and confusion and to give the seller, who had agreed to deliver his goods F. O. B. at their destination, an efficient remedy in his own jurisdiction to recover the loss, that the Carmack Amendment was passed. It was clearly the purpose of Congress to provide a new remedy leaving intact and unimpaired all the remedies that had theretofore existed either by Federal statute, by state statute or the common law, unless such former remedies were inconsistent with the terms of the Carmack Amendment. The plain purpose and object of Congress in passing this legislation, was to facilitate commerce and render the rights of the shipper more secure. It would be strange indeed, if in granting a new remedy to ameliorate the condition of the seller, Congress has inadvertently destroyed the most efficient remedy of the purchaser which consisted of the presumption against the terminal carrier. It must be borne in mind that Congress had in view the promotion of commerce and the protection of the rights of those engaged in it, and certainly this court will not presume that in carrying out that object and in rendering the rights of the seller more secure, it impaired the rights and destroyed the security of the purchaser.

There is nothing inconsistent in making the initial carrier absolutely liable for the non-fulfillment of the common law obligations not only of itself, but of all

connecting carriers, and at the same time leave intact the remedy theretofore existing against the terminal carrier, including the presumption of loss on that line. It will be observed that Congress did not undertake to create a mere presumption against the initial carrier. It went much farther. It imposed an absolute obligation on the initial carrier to answer for a failure to perform the common law duty by any of the connecting carriers. If Congress had simply created a rebuttable presumption against the initial carrier for the loss on the through line, it could exculpate itself by proving that it delivered the goods in good condition to the next succeeding carrier. This, however, is not the effect of the Carmack Amendment. That amendment does not create a presumption. It creates an absolute liability against which no proof of loss elsewhere can avail. The liability created by the amendment rests upon the initial carrier alone. It was not intended to modify or abrogate nor did it modify or abrogate the liability of any carrier, initial, terminal or intermediate, for its own negligence. While in an action against any of the connecting carriers involving the terms of the through bill of lading, the terms of such bill of lading will govern, yet in an action against any other than the initial carrier, based upon common law liability of a connecting carrier, the Carmack Amendment can have no application whatever, either as to the right of action, the form of the remedy or the requisites of proof. These are all left by the amendment exactly where they were at common law. In an action against the initial carrier for loss or damage occurring on its

own line, the liability would rest alone upon the common law. The Carmack Amendment is invoked, so far as the common law liability is concerned, only when that liability is sought to be fastened on the initial carrier, regardless of where the loss or damage occurred. We now have three classes of cases involving the common law liability of carriers for loss or destruction of goods:

1. Against either the initial or the intermediate carrier for loss on its own line where the burden of proof would be upon the plaintiff to establish the loss on the line sued.

2. An action under the Carmack Amendment against the initial carrier for the common law liability for loss or damage occurring anywhere on the through line.

3. An action against the terminal carrier for loss or destruction on the line of such terminal carrier, in which case there is a rebuttable presumption that the loss or damage occurred on that line.

This leaves an efficient common law remedy to the consignee when the loss falls upon him, and also under the Carmack Amendment gives an efficient remedy to the consignor when under the terms of the sale he must bear the loss. It seems to us little less than fantastic to contend that in increasing the security of the rights of the consignor and rendering his remedy more efficient, Congress has by indirection and inadvertance,

greatly impaired the security and rendered less efficient the remedy of the consignee.

This being a Federal question, this court, of course, is the final arbiter, yet it is interesting to observe that several states have had this exact question under consideration and we, therefore, present to this court the results of their labor.

PRESUMPTION NOT ABROGATED.

The Carmack Amendment does not abrogate the rule of evidence which raises a rebuttable presumption, in a suit against the terminal carrier, that goods delivered in good order to the initial carrier and delivered by the terminal carrier in a damaged condition, were injured on the line of the latter.

Louisville & N. R. Co. v. *Lyman*, 71 So. 338 (La.)
Uber v. *Chicago, M. & St. P. Ry. Co.*, 138 N. W. 57 (Wis.).
Duvall v. *Louisiana Western R. Co.*, 65 So. 104.
Atlantic Coast Line R. Co. v. *Thomasville Live Stock Co.*, 78 S. E. 1019 (Ga.).
Glassman v. *Chicago, R. I. & P. Ry. Co.*, 147 N. W. 757 (Iowa).
T. W. Newborn & Co. v. *Louisville & N. R. R. Co.*, 87 S. E. 37 (N. Car.).
Chicago, R. I. & P. Ry. Co. v. *Harrington*, 143 Pac. 325 (Okla.).
Eastover Mule & Horse Co. v. *Atlantic Coast Line R. Co.*, 83 S. E. 599 (S. Car.).
Erisman v. *C. B. & Q. R. Co.*, 163 N. W. 627 (Ia.)

THIS A COMMON LAW ACTION.

The judgment in this case is based on three causes of action, the first and second of which involve interstate shipments, and the third cause of action involves an intrastate shipment. The first two only are involved in this court. The third paragraph of plaintiff's petition as to the first cause of action is as follows:

> "Plaintiff further alleges and says that in the transportation of said car of apples from Gibson, Indiana, to Clarkson, Nebraska, the defendant road, its agent, servants and employees, carelessly and negligently permitted said car of apples to become frozen and that this defendant delivered said car of apples to this plaintiff and its consignee at Clarkson, Nebraska, badly frozen and damaged, said apples being largely unmarketable upon delivery as a result of their condition."

And substantially the same language is found in the statement of the second cause of action. (See Transcript, pages 2, 3 and 4.)

The intent and purpose of the Carmack Amendment was to render the initial carrier liable for damages occurring anywhere on the through route where a through bill of lading is issued, and further providing that where the initial carrier must respond in damages for loss or damages caused by a subsequent carrier, the initial carrier has a right of action against such subsequent carrier. The mischief to be remedied by the Carmack Amendment was compelling the shipper to

perform the difficult task of discovering upon what part of the through route the damage occurred, or going to a distant part of the country to sue the terminal carrier. This amendment gave the shipper a *new and additional remedy.* Under that amendment he could sue the original carrier issuing the through bill of lading, and if he recovered, the law enabled the initial carrier to sue the carrier causing the loss. This statute leaves intact the common law liability of the common carrier, not only for its negligence, but as an insurer of the goods where the loss or damage occurs on its own line. Neither the terminal carrier nor any connecting carrier except the initial carrier is made primarily liable by the Carmack Amendment, but the common law imposing a liability not only for negligence, but as insurer of the goods, is left intact as to damages caused by the carrier sued. It will be observed from the foregoing quotation from the plaintiff's petition that this action is in no wise based upon the statutory liability created by the Carmack Amendment, but rests solely upon the common law liability of the plaintiff in error for damages occurring upon its own line, and by its own negligence. There is no attempt here to hold the appellant liable for damages accruing to plaintiff's property on the line of any other carrier. It, therefore, follows that the Federal law has no application whatever to this action, it being a purely common law action for the negligence of a common carrier, and for damages occurring upon its own line.

In the case of *Cincinnati, New Orleans & Texas Pa-*

cific Railway Company v. *Rankin*, 241 U. S. 319, 36 Supreme Court Reporter, 555, this court, in the first point of the syllabus says:

> "The common law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack Amendment of June 29, 1906, (34 Stat. at L. 584, chap. 3591), to the act of February 4, 1887, (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, 8592), 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury 'caused by it' or by any other carrier to which the shipment may be delivered."

And in the discussion of the case Justice McReynolds says:

> "Counsel concede liability of a common carrier under the long-recognized common law rule not only for negligence, but also as an insurer, and that unless the Carmack Amendment (copied in margin) has changed this rule, the railway is responsible for damages not exceeding specified value. But they *insist* that in *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L. R. A. (N.S.) 257, 33 Sup. Ct. Rep. 148, we held this amendment restricts a carrier's liability to loss 'caused by it.' And, consequently, they say, the trial court erred when it charged: 'In this case the carrier is held to the highest degree of care for the safe transportation of the animals.'
>
> Construing the Carmack Amendment, we said through Mr. Justice Lurton in the case cited (p. 506, 507): 'The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may

> be delivered", and plainly implies a liability for some default in its common law duty as a common carrier.' Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common law doctrine theretofore approved by us in respect of a carrier's ability for loss occurring on its own line."

The plain import of the foregoing decision is that the Carmack Amendment took away none of the rights of the shipper, whether they previously existed by Federal statute, state statute, *or by common law*, unless such previous remedy is inconsistent with that Amendment. There is nothing in the Carmack Amendment anywhere that purports to regulate or control the remedy of a shipper against the common carrier upon whose line the loss or damage occurs. That liability is left exactly where it was before the Carmack Amendment was passed. It is in no wise inconsistent with the provisions of that Amendment, and is not in any respect affected thereby.

In the case of *Adams Express Company* v. *Croninger*, 226 U. S. 491, 33 Sup. Ct. Rep. 148, this court, speaking through Mr. Justice Lurton, said:

> "What this court said of the 22d section of this act of 1887 in the case of *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Sup. Ct. Rep. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or

> other statutes. But this court said of that contention what must be said of the proviso in the 20th section, that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, *or common law*, not inconsistent with the rules and regulations prescribed by the provisions of this act."

There is no conflict or inconsistency between the Carmack Amendment and the common law presumption against the terminal carrier. In the first place they deal with entirely different matters. The Carmack Amendment deals with the remedy of the shipper against the initial carrier, while the common law presumption contended for in this case, applies only to the liability of the terminal carrier. The Carmack Amendment can be invoked by the shipper only against the initial carrier, while the common law presumption which we contend for, can be invoked against the terminal only. They, therefore, deal with entirely distinct matters and there is no conflict or inconsistency in each being applied to its proper subject matter. If the common law action against the terminal carrier still exists, notwithstanding the Carmack Amendment, there would certainly be no reason why the court should not apply the necessary and wholesome presumption that the goods remained in the same condition in which they were shipped until they reached the terminal carrier. The liability imposed by the Carmack Amendment does not rest upon the presumption that the damage accrued on the line of the initial carrier. The liability is im-

posed on the initial carrier regardless of where the damage occurred. The statute, in effect, makes the initial carrier the guarantor for the faithful performance of their common law duty by the subsequent carriers. Proof. therefore, that the damage occurred after the initial carrier parted with the goods, is no defense. That statute does not rest in any decree upon the probability that the damage accrued on the line of the initial carrier. The liability of the initial carrier under the statute exists wholly regardless of where the damage actually accrued. This statute, however, is only applicable in a suit by the shipper against the initial carrier.

This court has uniformly held that the Carmack Amendment left intact and in full force all the rights of the shipper against the terminal or intermediate carrier on whose line the damage actually occurred. The most valuable part of this remedy against the terminal carrier is the common law presumption that the damage accrued on its line. It therefore, can not be successfully contended that the presumption is abrogated because inconsistent with the terms of the statute. There is no conflict between the statute and the presumption, nor is there any inconsistency in the court enforcing both of them.

CARMACK AMENDMENT AS CONSTRUED BY THIS COURT.

A constant effort has been made by the carriers of this country since the Carmack Amendment was passed,

to have that amendment so construed as to relieve them from a part of their common law duty as carriers. Such efforts have met with defeat in every case presented to this court, which has repeatedly held that the purpose of the act was to give shippers *a new remedy and not to destroy or impair their old ones.*

In the case of *Galveston, Harrisburg & San Antonio Railway Company* v. *Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, it was contended by the carrier that the Carmack Amendment destroyed the presumption against the initial carrier where there was a failure to deliver to the consignee and insisted that an action could be maintained only upon the production of evidence of negligence. In answer to that contention this court, through Justice Lamar, said:

> "Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which

> it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed."

And in the case of *Cincinnati, New Orleans & Texas Pacific Railway Company* v. *Rankin*, 241 U. S. 319, 36 Sup. Ct. 555, this court in the first point of the syllabi says:

> "The common law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack Amendment of June 29, 1906, (34 Stat. at L. 584, chap. 3591), to the act of February 4, 1887, (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, Sec. 8592), Sec. 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury 'caused by it' or by any other carrier to which the shipment was delivered."

In the case of *Chicago & E. I. R. Co.* v. *Collins Produce Co.*, 249 U. S. 186, 39 Sup. Ct. 189, the action was against the initial carrier. The carrier contended that under the Carmack Amendment, carriers were relieved of their common law liability as insurers of the safety of the goods carried and that the shipper could recover, even of the initial carrier, only by showing that the loss was "caused by" the carrier, which was only another way of claiming that no recovery could be had against any carrier under the Carmack Amendment without affirmative proof of negligence. That contention was answered by this court, speaking through Mr. Justice Clarke, as follows:

"The first claim is that the court refused to rule, that by its terms, the Carmack Amendment (Act June 29, 1906, Chap. 3591, Sec. 7, Pars. 11, 12, 34 Stat. 595 (Comp. St. Secs. 8604a, 8604aa) casts upon the shipper the burden of proving affirmatively that the loss which occurred on a connecting line was 'caused by' the connecting carrier. But, assuming that the question is presented by the record, which is doubtful, *Galveston, Harrisburg & San Antonio Ry Co.* v. *Wallace*, 223 U. S. 481, 491, 32 Sup. Ct. 205, 56 L. Ed. 516, rules that, under the act as construed in *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 205, 206, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N.S.) 7, in such a case as we have here the liability of the initial carrier is as if the shipment had been between stations in different states, but both upon its own line, and this renders the contention untenable. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N.S.) 257, does not conflict with this conclusion, *Cincinnati, New Orleans & Texas Pacific Railway Co* v. *Rankin*, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265."

* * * * * *

The duties and liabilities of a common carrier have been so fully discussed by this court, notably in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and in *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872, that they need not be restated here.

The common law principle making the common carrier an insurer is justified by the purpose to prevent negligence or collusion between dishonest carriers or their servants and thieves

or others, to the prejudice of the shipper, who is, of necessity, so remote from his property, when in transit, that proof of such collusion or negligence when existing, would be difficult if not impossible. *Coggs* v. *Bernard*, 2 Lord Raymond, 909; *Riley* v. *Horne*, 5 Bing. 217. The obligation to transport and to deliver is so exception and absolute in character that the relation of the carrier to the shipper was characterized in *Railroad Co.* v. *Lockwood, supra,* as so partaking of a fiduciary character as to require the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him, and so lately as *American Express Co.* v. *Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536, this court declares that if a carrier, by connivance or fraud, permitted a judgment to be rendered against it for property in its charge, such judgment could not be invoked as a bar to a suit by a shipper.

These decisions, a few from many, illustrate the character of the relation of trust and confidence which must be sustained between a common carrier and a shipper. It rests at bottom upon a commercial necessity and public policy which would be largely defeated if the carrier were permitted by false representations, or by representations, which, though not intentionally false, were not known to be true, to procure the appropriation by military or other authority of property in its custody, as the jury found was done in this case, and thereby defeat its obligation to carry and deliver.

These principles of law governing the relations between the carrier and the shipper, amply justified the charge of the trial court to the jury

and the judgment of the Circuit Court of Appeals must be affirmed."

In the case of *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, it was contended by the carrier that the Carmack Amendment making the initial carrier absolutely liable for damages occurring anywhere on the through line, relieved the terminal carrier of liability. It was contended that inasmuch as the amendment imposed an absolute liability upon the initial carrier for loss or damages occurring anywhere on the route, whether the default was that of the initial, terminal or intermediate carrier, that there could be no liability of the terminal carrier and that the sole remedy of the shipper was against the initial carrier. In answer to this contention, this court said:

> There are only two questions presented here, and these are thus set forth in the brief in error:
>
> '1st. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of Sec. 20 of the Hepburn bill (34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, Sec. 8592).'
>
> '2d. That, under the stipulation in the bill of lading providing for the filing of claims for loss or damage, the action was barred.'
>
> The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the obligations of all participating carriers to the extent that the

terms of the bill of lading are applicable and valid."

It has thus been settled by the decisions of this court that the Carmack Amendment destroyed no security that the shipper theretofore enjoyed. It has been settled by this court that the common law liability of the carrier as an insurer, has been preserved; that the liability of the initial carrier is a common law liability so far as the loss is alleged to have occurred on its line; that the Carmack Amendment did not take away the common law liability of the terminal carrier. In other words, this court has held that that amendment in giving a new remedy did not impair any of the remedies theretofore existing at common law.

We are now met with the proposition that while the common law liability of the terminal carrier still exists, yet the efficiency of that remedy is taken from the shipper or consignee by an implied abrogation of the common law presumption that the loss happened on the terminal line. There is certaintly nothing in the language of the amendment itself that justifies any such construction. It is claimed, however, by the plaintiff in error that a statute making the initial carrier absolutely liable for a default in the common law duty of either the terminal or an intermediate carrier, is inconsistent with the presumption of loss on the terminal carrier. It is clear that Congress in the passage of the amendment, was dealing solely with the liability of the initial carrier and was not undertaking to affect in any manner, the common law liability of subsequent con-

necting carriers. It is only in a suit against the initial carrier that the amendment has any effect upon the common law liability for the loss or damage to the goods shipped. When, under the amendment, a recovery is had against the initial carrier for damages caused by a connecting carrier, the initial carrier under the statute has a right to recover against the connecting carier that was at fault. On the other hand, when the terminal carrier is sued for the loss, it has the power to protect itself by showing that the goods were damaged before coming into its possession, and if it is unable to show this, it is and should be, liable to the owner of the goods for the loss or damage. Any other rule would render the common law obligation of the terminal carrier practically valueless. Can it be possible that Congress, in undertaking to create a new remedy for the shipper and thereby to promote the security of commerce, intended not to deprive the consignee of his common law remedy against the terminal carrier for damages occurring on its own line, but to render that remedy precarious and practically destroy its value by destroying the common law presumption that the damage happened on that line? Is it possible that in order to give a new remedy to the consignor, it intended to deprive the consignee of the remedy that to him was most efficient? This court has already held that the amendment left the cause of action against the terminal carrier intact, so far as the loss occurred on its line, but this court is now asked to hold that while the amendment preserved the husk, it deprived the shipper of the kernel; that while it preserved his cause of action, it

destroyed the common law presumption that rendered the remedy efficient. This would create the same obstacle in the way of the shipper when he endeavored to enforce the liability of the terminal carrier that existed at common law, before the amendment was passed, when he endeavored to enforce the liability of the initial carrier. At common law, it was necessary for the shipper to show, in order to hold the initial carrier, that the loss occurred on its line, by affirmative proof of that fact. If the contention of the plaintiff in error is sustained, it will leave the consignee in exactly that situation when he undertakes to enforce the common law liability against the terminal carrier for damages accruing on that line. The contention here, is, that there is no presumption that goods delivered to the initial carrier in New York in good condition remained in good condition until they were delivered to the plaintiff in error in Indiana and that the burden was upon the owner in this case to prove affirmatively that the damage occurred upon the line of the plaintiff in error. This contention, if sanctioned by this court, would render practically useless to the shipper, his remedy against the terminal carrier, which this court has expressly held, still exists, notwithstanding the Carmack Amendment. It certainly cannot be presume that Congress, in its endeavor to give the shipper a more efficient remedy against the initial carrier, intended by the same legislation to deprive the shipper of the efficiency of his remedy against the terminal carrier. The disastrous effect of such a rule upon the security of shippers and especially upon the security of the con-

signee when the burden of loss falls upon him, certainly raises a strong presumption against Congress intending any such result. The contention of the plaintiff in error calls for a strained, unnatural and forced construction of the language of the statute and asks this court to read into the statute what Congress has not put there. This contention, like former contentions of the carriers, that this amendment modified, restricted or abrogated their duties under the common law, should be overruled.

ANALOGOUS STATE STATUTES.

It is interesting to observe that where statutes have been passed by the states, giving the shipper a new remedy, these statutes have been construed as not modifying the common law duty theretofore resting upon the common carrier, or the presumption here involved. Under a statute of South Carolina providing that on a through bill of lading the responsibility of each carrier ceases on delivery to a connecting line in good order and on obtaining a receipt to that effect from such connecting carrier the common law presumption of loss upon the last carrier, was not abrogated. In the case of *Willett* v. *Southern Ry. Co.*, 45 S. E. 93, the Supreme Court of that state says:

> "First, where goods are delivered to the consignee by the last carrier of connecting lines in a damaged condition, is there any presumption that they were damaged while in charge of the last carrier, or has such presumption been entirely removed and transferred to the initial car-

rier by Section 2176 of the Civil Code, which was in force when this action was commenced, and which makes the initial carrier liable in every case for loss or damage to goods, allowing it, however, to discharge itself by the production of a written receipt from the next carrier to which it properly delivered the goods The general rule is that the burden is on the carrier which delivers the goods to consignee to respond to any damage which occurs in transit, or show that it was done while in the hands of some other carrier. This rule has never been under judicial discussion in this state, but it is supported by the great weight of authority elsewhere. Cyc. 491; *Moore* v. *R. R. Co.*, 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298; *Laughlin* v. *Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493. Hale on Bailments and Carriers thus states the rule, quoting numerous authorities in support of it: 'In an action against the last carrier, if it is shown that the goods were delivered to the first carrier in good order, this condition, in the absence of a contrary showing, will be presumed to continue until the goods come into the possession of the last carrier, and that the injury occurred on that line. This is on the principle that things once proved to have existed in a certain condition are presumed to have continued in that condition until the contrary is established by evidence.' We think this doctrine is supported by public policy so important as to amount to necessity. With the immense traffic and the resulting complicated business methods of modern American railroads, and the connection of these roads with one another, to impose upon the owner of the property passing over connecting lines the burden of making af-

> firmative proof that the loss occurred on a certain one of these lines would be practically relieving of liability railroads handling freight as connecting lines; for the owner could rarely make the required proof, and, when he could make it, in most instances the expense of doing so would be greater than the value of the goods. The rule works no hardship to the railroads as another, and can easily trace loss or damage." common carriers, because they receipt to one

Under a statute of Mississippi providing that if the carrier fails to furnish certain record evidence it shall be presumed to have caused the damage, it was held that this statute did not abrogate the common law presumption against the terminal carrier.

In the case of *Jordan* v. *Mississippi Cent. R. Co.*, 65 So. 276, the Supreme Court of that state said:

> "There is no merit in appellee's contention that the rule announced in the case of *Mobile & Ohio R. R. Co.* v. *Tupelo Furniture Manufacturing Co., supra*, has been abrogated by Section 4853 of the Code of 1906, which section, according to the brief of counsel for appellee, was enacted after the case was decided. This section of the Code provides that upon the occurrence of certain things therein set forth the loss or damage shall be conclusively presumed to have occurred where the goods were in the hands of the last carrier, while the rule announced in the Tupelo Furniture Company case is simply a prima facie one, which results solely by reason of the delivery of the goods to the initial carrier in good condition, followed by delivery to the

consignee by the last carrier in bad condition. There is no conflict between the two rules, and one has no bearing on the other."

PRESUMPTION INVOLVED IN CASE IN THIS COURT.

In the case of *Kansas City Southern Ry. Co.* v. *Carl*, 121 S. W. 9832, the Supreme Court of Arkansas in the first point of the syllabus says:

> "Where the initial carrier receives goods for transportation to another state by a connecting carrier, in absence of contrary evidence it is presumed that the goods were lost en route through the negligence of the last carrier, and the burden is on it to show that the loss did not occur on its line."

That case was brought to this court by proceedings in error and will be found in 227 U. S. 639, 33 Sup. Ct. 391. There was therefore involved, in that case, the exact question raised by the plaintiff in error in the case at bar. If the Carmack Amendment had the effect of destroying the common law presumption against the terminal carrier, there was error in the record in that case on that point and it being a federal question, was fairly before this court. It seemed to be taken for granted by all the parties, that the holding of the state court as to the common law presumption against the terminal carrier, was right. It is true that the judgment of the state court was reversed, but it was reversed upon the ground that the state court had misconstrued the Carmack Amendment as to the validity of the contract of exemption or limitation. No refer-

ence is made in the opinion to the ruling of the state court that the common law presumption against the initial carrier existed, notwithstanding the Carmack Amendment.

CASES CITED BY PLAINTIFF IN ERROR.

It seems that the case chiefly relied upon by the plaintiff in error, is that of *Charleston, Etc., Railway* v. *Varnville Furniture Company*, 237 U. S. 597, 35 Sup. Ct. 715. That case is no authority for the contention of the plaintiff in error in this case. This is an action at common law against the terminal carrier for loss by negligence on its own line. In that case, the action was based upon a state statute. True, $14.75 of the claim made by the plaintiff in that case, was for damage to the furniture while in transit and $4.60 of the claim was for overcharge of freight for carriage and $50.00 was a penalty under the statute of South Carolina. The court was considering only the $50.00 penalty and it was held that the imposition of this penalty for a failure to comply with the terms of the statute, was a direct interference with interstate commerce and was, therefore, void. The court, by Mr. Justice Holmes, said in that case:

> "The South Caralina act, on the other hand, extends the liability to losses on other roads in other jurisdictions, and increases it by a fine difficult to escape. *It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss.* We leave on one side the remote analogies put forward in the decision of the state court, as, in our opinion, the

cases and principles to which we have referred are sufficient and direct. *We should add that the item for overcharges also falls under the act of Congress, Sec. 2, as it now stands, since that section makes the receiving of greater compensation than is received from others for similar services an unjust and unlawful discrimination. The penalty, the only matter that we are considering*, was exacted for a failure to pay both claims, within forty days, irrespective of the question whether adequate investigation had been possible, as required by the Interstate Commerce Commission's rulings, Nos. 462, 236, and 68."

The only case directly in point in this controversy, cited by the plaintiff in error, is *Henderson* v. *Kansas City Southern Railway Co.*, 147 La. 647, 85 So. 625. It is there directly held that the Carmack Amendment destroyed the common law presumption of loss on the terminal carrier. It must be observed, however, that in the earlier case of *Duvall* v. *Louisiana Western Railway Co.*, 135 La. 189, 65 So. 104, that court had already held that the Carmack Amendment had no effect upon the common law presumption against the terminal carrier. It was led to overrule its former holding by a misunderstanding of the effect of the decision of this court, in the case of *Railroad* v. *Varnville Furniture Company*. Upon reading the opinion of the Supreme Court of Louisiana in the latter case, it is apparent that they were induced to overrule their earlier decision because of a misunderstanding of the force and effect of the decision of this court.

The case of *Adams Express Company* v. *Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, is also cited as authority for the abrogation of the common law presumption by the Carmack Amendment. No question was raised in that case of the liability of the connecting carriers, as it appears that the Adams Express Company was the only carrier concerned in the shipment. The only controversy was the amount for which the Express Company should be made liable. As we read that case there is absolutely nothing in it that lends the least support to the proposition that the Carmack Amendment abrogated the common law presumption against the terminal carrier.

The case of *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, is also cited in support of the contention of the plaintiff in error. This case also involved no rights of the shipper against connecting carriers. The action was for loss of baggage transyorted by the Railroad Company from Boston to Sunapee Lake Station in New Hampshire, and here again, the only point involved, was the validity of certain limitations as to value of the property transported. There is nothing in the decision of this case that in the remotest degree tends to support the contention of the plaintiff in error that the common law presumption against the terminal carrier has been abrogated.

The only other case cited by plaintiff in error to support its contention is *M. K. & T. Ry. Co.* v. *Harris*, 233 U. S. 412-420, 34 Sup. Ct. 790. The only point involved in this case was the validity of a judgment of a

Texas court allowing the successful plaintiff an attorney's fee in a suit against a carrier upon a claim for loss in an interstate shipment which claim was not paid after demand There is no discussion whatever in this case as to the existence or abrogation of the common law presumption against the terminal carrier. In that case, there were connecting carriers, but the loss admittedly occurred on defendant's line in the State of Texas. The question, therefore, involved in this case could not have arisen in that case. The judgment of the Texas court was affirmed in this court, it being held that the Carmack Amendment had no application to the facts involved in that case. This leaves the contention of the plaintiff supported only by the *Henderson* case, which, as we have shown, was based upon a misapprehension of the decision of this court in the Varnville Furniture Company case.

FEDERAL LAWS MUST PREVAIL.

With the second proposition presented in the argument of the plaintiff in error, to the effect that where the laws of the United States regulating Interstate Commerce are in conflict with the state laws, policies or decisions, the former controls, we have no contention. We fully and frankly concede that if this court finds that the common law presumption against the terminal carrier covers the same subject matter as that covered by the Carmack Amendment and is inconsistent therewith, the Federal law must prevail and that state statutes, decisions, policies and the common law, must yield thereto. Before, however, this court will hold

that a wholesome, necessary and universally applied common law presumption is abrogated by the Carmack Amendment, this court will have to be convinced that they not only apply to the same subject matter, but that they are in irreconcilable conflict. In our opinion, that has not been shown in this case and the common law presumption against the terminal carrier, so essential to commerce and so vital to the consignee's remedy, is still the law enforced not only by the courts of the State of Nebraska, but by the national courts also.

Respectfully submitted,

ELMER J. BURKETT,
HENRY H. WILSON,
ELMER W. BROWN,
RALPH P. WILSON,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1920.

No._____

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

C. C. WHITNACK PRODUCE COMPANY,

Respondent.

In the Matter of the Application of Chicago and North Western Railway Company for a Writ of Certiorari to the Supreme Court of the State of Nebraska.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Chicago and North Western Railway Company for a Writ of Certiorari directed to the Supreme Court of the State of Nebraska, and ordering that the record in a certain cause be certified to this

honorable court for final review and determination according to law, said appealed cause being entitled as follows: In the Supreme Court of Nebraska; C. C. Whitnack Produce Company, Plaintiff and Appellee, vs. Chicago and North Western Railway Company, Defendant and Appellant.

Your Petitioner, Chicago and North Western Railway Company, respectfully shows to this honorable court as follows:

I.

Your Petitioner is, and at the time of the commencement of the action above referred to, was a railway corporation organized and existing under and by virtue of the laws of the States of Illinois and Wisconsin.

II.

On February 3, 1917, C. C. Whitnack Produce Company of Lincoln, Nebraska, commenced an action in the District Court of Lancaster County, State of Nebraska, against your Petitioner, entitled C. C. Whitnack Produce Company, Plaintiff, vs. Chicago and North Western Railway Company, Defendant, and in its amended petition filed alleged in substance:

For a first cause of action plaintiff alleged that in the month of November, 1914, defendant received at Gibson, Indiana, car LS&MS number 140156 containing apples consigned to the plaintiff or its agent, G. W. Pickering, at Lincoln, Nebraska, and that defendant carried the shipment over its line to Lincoln, Nebraska, where

plaintiff diverted or rebilled the same to Clarkson, Nebraska, over defendant's line. That between Gibson, Indiana, and Clarkson, Nebraska, the defendant carelessly permitted the apples to become frozen and damaged to the plaintiff's total damages in the sum of $293.37.

For a second cause of action plaintiff alleged that during the month of November, 1914, S. F. R. D. car number 8546 containing apples was received by defendant at Gibson, Indiana, for shipment to G. W. Pickering, plaintiff's agent, and that between Gibson, Indiana, and Lincoln, Nebraska, said apples were carelessly permitted to become frozen, and that when same were delivered to the plaintiff and its consignee at Grand Island, Nebraska, (a new shipment from Lincoln on the Union Pacific), the plaintiff was unable to complete the sale thereof and was obliged to resell the same to the plaintiff's total damage in the sum of $218.36.

III.

The answer of the defendant alleged as to plaintiff's first cause of action, that said shipment originated at Youngstown, New York, November 6, 1914, on the line of the Niagara Gorge Railroad Company, which was the initial carrier. That plaintiff's agent consumed from the 6th to the 10th of November in loading the car. That the Niagara Gorge Railroad Company delivered the shipment to the New York Central Railroad Company, which in turn delivered the car to the Michigan Central Railroad Company, which in turn delivered the car to the Indiana Harbor Belt Railroad Company, which latter company delivered the car to the defendant at Proviso, Illinois, on November 15, 1914. That defendant trans-

ported the shipment from Proviso, Illinois, to Council Bluffs, Iowa, and delivered the same to the Union Pacific Railroad Company on the 18th of November, 1914. That thereafter and on the 23rd of November, 1914, the Union Pacific again delivered the shipment to the defendant, at Omaha, Nebraska, and the defendant transported the same to Lincoln, Nebraska, where it arrived on the 28th of November. The plaintiff reshipped said car to Dodge, Nebraska, where it was partly unloaded, and thereafter was shipped to Clarkson, Nebraska, where it arrived on the 5th of December, 1914. That said shipment constituted interstate commerce and that defendant handled the same as connecting and terminal carrier only. Otherwise the answer was a general denial.

The defendant's answer to the second count of plaintiff's petition alleged that said car originated at Ransomville, New York, on the line of the New York Central Railroad Company, who delivered the same to the Indiana Harbor Belt Railroad Company, and that the latter Company, on the 16th of November, 1914, delivered the car to the defendant at Proviso, Illinois. That defendant transported the same to Lincoln, Nebraska, and delivered the same to the plaintiff, and that the plaintiff thereafter reshipped said car over the line of the Union Pacific from Lincoln, to Grand Island, Nebraska; that defendant handled said car as a connecting carrier only; that said shipment was interstate and that the defendant was not guilty of any negligence.

The Reply of the plaintiff admitted the truth of the allegations in defendant's answer as to the route over which said shipment moved and the carriers handling the same, and was otherwise a general denial.

IV.

Upon the issues thus joined a trial to a jury was had in the District Court of Lancaster County, Nebraska, on February 16, 1918, the jury returning a verdict for the plaintiff for $452.00 upon which judgment was entered.

Your Petitioner duly filed its motion for new trial in the District Court of Lancaster County, which was overruled, and your petitioner thereupon appealed to the Supreme Court of Nebraska, which court, by its opinion filed May 15, 1920, affirmed the judgment of the District Court of Lancaster County. Thereupon your petitioner duly filed its motion for a rehearing in the Supreme Court of Nebraska, which motion was denied without opinion, on July 14, 1920.

V.

At the trial of the case in the District Court of Lancaster County there was no evidence as to where any of the damage actually occurred and especially there was no evidence that it occurred on the line of the Chicago and North Western Railway Company. The evidence showed that each of the shipments was transported at least five hundred miles before reaching the line of the Chicago and North Western Railway Company at Proviso, Illinois. The evidence showed that the cars were both sealed when delivered to the defendant at Proviso, Illinois. The evidence tended to show that the cars were delivered to the initial carriers in New York State in each instance in good order, and the evidence shows that on arrival of each of the cars at Lincoln, Nebraska, the apples were more or less frozen.

Upon this state of the record your Petitioner made its motion to the trial court as follows:

> "The defendant moves the court at the close of the testimony to instruct the jury to return a verdict for the defendant on the first and second causes of action, for the reason that as to those causes of action the suit is against this defendant as a connecting carrier only; and there is no evidence of the condition of either of the shipments at the time the same were received by the defendant."

This motion was denied, to which due exception was taken.

The trial court instructed the jury as follows, by his instruction number two:

> "You are instructed in your consideration of the shipments from the State of New York as follows: That if you find from the evidence the apples were in good order and unfrozen when they were put into the cars in the State of New York and received by the railroad at those points; and you further find from the evidence that they were received at Lincoln in a frozen condition, then there is a presumption that they were so frozen by reason of the negligence of the carrier; and you are further entitled to presume that this negligence occurred while the apples were being transported over the defendant's line, it being the last carrier. This would charge the defendant with liability for the damage, unless you find from the evidence that either the apples were frozen when loaded, or, were received by the defendant in a damaged condition."

The trial court also instructed the jury by his instruction number three as follows:

"If you find from the evidence that the apples were shipped in good order and were frozen when they reached Lincoln, then the burden of proof is upon the defendant to show that they were in that condition at the time they were received upon the defendant's line, or, that the defendant exercised due diligence to protect them from freezing while in its possession, by using all ordinary and customary means to that end."

VI.

The Supreme Court of Nebraska, in affirming the judgment of the District Court of Lancaster County, announced the law as follows:

"1. When suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier the presumption is that they were in good condition when delivered to the terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession."

"2. The common law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack Amendment of June 29, 1906 (34 St. at Large, p. 548, ch. 3591), to the act of February 4, 1887, (24 St. at Large, p. 379, ch. 104, Comp. St. 1913, sec. 8592), sec. 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury 'caused by it' or by any other carrier to which the shipment may be delivered. *Cincinnati N. O. & T. P. R. Co. vs. Rankin,* 36 Sup. Ct. Rep. 555."

The Supreme Court of Nebraska further says in its opinion in the case:

> "Of the two interstate shipments defendant was the terminal carrier, the cars having been transported by three or more intermediate carriers before being delivered to it.
>
> "It is argued on the part of defendant that its liability, if any, as to the interstate shipments arises under and is subject to the provisions of the Carmack Amendment of June 29, 1906, 34 St. at Large, p. 584, ch. 3591, and that in the event of loss, under the facts herein, the amendment in question supersedes the common law presumption that, if goods are received in good condition by the initial carrier and are damaged in transit, the loss occurred while they were in possession of the terminal carrier."
>
> "Under the authorities in like cases it seems that the burden is on plaintiff to show that the goods were in good condition when delivered to the initial carrier and that they were in damaged condition upon arrival at destination; and that the burden is on the terminal carrier defendant to show that the injury did not result from any cause for which it was responsible."

The Supreme Court of Nebraska further says in the Opinion:

> "The weight of authority in this class of cases and the better rule appears to be that when suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier the presumption is that they were in good condition when

delivered to the next or terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession."

VII.

Your Petitioner relied, both in the District Court of Lancaster County and in the Supreme Court of Nebraska, as shown by the record and its printed brief, upon the following propositions:

"1. There is no common law presumption applied in Federal Courts that damage to an interstate shipment occurred on the line of the last carrier; on the contrary, Federal Courts hold that since the enactment of the Carmack Amendment to the Interstate Commerce Law, making the initial carrier liable for the entire transportation, that all such presumptions heretofore applied by state courts are superseded, and recovery against a connecting carrier can only be had by affirmatively showing that it caused the damage."

Boston & Maine R. R. vs. Hooker, 233 U. S. 97.
M. K. & T. Ry. vs. Harris, 233 U. S. 412-420.
Adams Express Company vs. Croninger, 226 U. S. 491.
Charleston, etc. R. R. Co. vs. Varnville Furniture Co., 237 U. S. 597.

Henderson v Kansas City & Ry Co 85 So. 62

"2. Liability of a carrier on account of interstate shipments is to be determined by the laws of the United States, the provisions of the bills of lading, and the common law as applied in Federal Courts. State laws and policies have no application."

N. Y. C. & H. R. Ry. Co. vs. Beaham, 242 U S. 148.
United Metals Selling Company vs. Pryor, 243 Fed. 91 (C. C. A., Eighth Circuit.)
Southern Railroad Company vs. Prescott, 240 U. S. 362.
A. T. & S. F. Ry. vs. Harold, 241 U. S. 371.

VIII.

The questions and propositions of law involved in this case are as follows:

1. Whether since the enactment of the Carmack Amendment to the Interstate Commerce Act there is a presumption as to interstate shipments that the loss occurred on the line of the last carrier, thereby enabling the plaintiff to make a prima facie case against the last carrier by showing that the shipment was delivered to the initial carrier in good condition and was delivered at destination by the last carrier in a damaged condition.

IX.

And your Petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

1. Because there has never been any rule of law announced by Federal Courts to the effect that there is a presumption that the damage to an interstate shipment occurred on the line of the last carrier, unless the last carrier, assuming the burden of proof, excuses itself from any charge of negligence.

2. Because it was error for the Supreme Court of Nebraska to hold in accordance with State Court decisions that there is a presumption that the loss occurred on the line of the last carrier under the circumstances above mentioned.

3. Because the decision and opinion of the Supreme Court of Nebraska is in conflict with the decision of this court in the case of *Charleston, etc. R. R. Co. vs. Varnville Furniture Co.*, 237 U. S. 597.

4. Because your Petitioner has been denied the right to immunity from liability under the Interstate Commerce Act as delivering carrier for damage to an interstate shipment where no evidence was offered to prove that your Petitioner caused the loss.

WHEREFORE, your Petitioner prays that this Honorable Court will be pleased to grant a Writ of Certiorari in this case to the Supreme Court of the State of Nebraska and cause the record in this case to be brought to this Honorable Court for final review and determination.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

By Maynard Dreesbach.

Its Nebraska Attorney.

STATE OF NEBRASKA, }
COUNTY OF DOUGLAS, } ss.

WYMER DRESSLER, being first duly sworn on oath deposes and says that he is Nebraska Attorney for the Chicago and North Western Railway Company, and also the attorney of record for the above named Petitioner, and makes this verification for and in its behalf, and is thereunto duly authorized; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief; that his knowledge and belief are derived from the record in this case in his possession and custody as such attorney, and from his personal knowledge of the proceedings had in the District Court of Lancaster County, Nebraska, and in the Supreme Court of the State of Nebraska.

.....

Subscribed and sworn to before me this.....
day of.....A. D. 1920.

.....

Notary Public,
Douglas County, Nebraska.

My commission expires.....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1920.

No._____

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

C. C. WHITNACK PRODUCE COMPANY,

Respondent.

In the Matter of the Application of Chicago and North Western Railway Company for a Writ of Certiorari to the Supreme Court of the State of Nebraska.

To BURKETT, WILSON, BROWN & WILSON,

Counsel for the above named respondent; and

To THE ABOVE NAMED RESPONDENT:

PLEASE TAKE NOTICE that on the first Monday, (being the fourth day) of October, 1920, upon the opening of Court, or as soon thereafter as Counsel can be heard, at the Court Room of the Supreme Court of the United States, in the City of Washington, D. C., we shall present

to the Court the accompanying Petition for the issuance of a Writ of Certiorari to be directed to the Supreme Court of the State of Nebraska, and shall ask that permission be given to present such Petition, and that the Writ of Certiorari be issued as in said Petition prayed.

.....

Counsel for Petitioner.

Due personal service of the foregoing Notice and accompanying Petition for Writ of Certiorari, and of the Brief of Petitioner in support of said Petition, is hereby admitted by each of the undersigned Counsel for the above mentioned Respondent, this.....

day of.....A. D. 1920.

.....

Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1920.

No.————

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

C. C. WHITNACK PRODUCE COMPANY,

Respondent.

In the Matter of the Application of Chicago and North Western Railway Company for a Writ of Certiorari to the Supreme Court of the State of Nebraska.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

This action involves the question, whether or not, as to interstate shipments there is a presumption that

the loss occurred on the line of the last carrier, so as to make the last carrier liable without any evidence that it actually committed the wrong.

Your Petitioner contends:

There is no common law presumption applied in Federal Courts that damage to an interstate shipment occurred on the line of the last carrier. On the contrary, Federal Courts hold that since the enactment of the Carmack Amendment to the Interstate Commerce Law, making the initial carrier liable for the entire transportation, that all such presumptions heretofore applied by state courts are superseded, and recovery against a connecting carrier can only be had by affirmatively showing that it caused the damage.

The facts in the case are fully stated in the Petition filed herewith.

We have searched the digests carefully and have discovered no decision by any Federal Court announcing the rule of common law which was applied by the trial court in this case and affirmed by the Supreme Court of Nebraska. On the other hand, we believe that repeated decisions by the Supreme Court of the United States establish the doctrine that as to interstate commerce no such presumption is applicable, in view of the Act of Congress regulating interstate commerce, and particularly the Carmack Amendment thereto, affording to shippers a complete remedy against the initial carrier for any damages arising out of interstate transportation.

In the case of *Charleston etc. Railroad Co. vs. Varnville Furniture Company,* 237 U. S. 597, the rule applied by the trial court in this case was disapproved and destroyed. South Carolina had long adhered to the rule announced by the trial court in the case at bar, that where goods were shown to have been delivered to the initial carrier in good condition and thereafter transported over the lines of several carriers and were delivered at destination by the last carrier in a damaged condition, that it will be presumed the damage occurred on the line of the last carrier, and that such presumption will support a liability. This common law policy of the South Carolina Courts was affirmed by the legislature of that state, which enacted a statute providing in substance that the last carrier of such goods should be liable for the loss, unless within a specified time it disproved such liability by discovering and disclosing to the plaintiff the guilty carrier. It was contended by the railroad that the Act of Congress had taken complete charge of the field of rights and remedies for damage to interstate shipments, and that the statute of South Carolina was therefore superseded by and in conflict with the Interstate Commerce Act and therefore void.

The court says:

"The defendant contended that the law imposing the penalty was invalid under the Act to Regulate Commerce, especially Section 20, known as the Carmack Amendment.

"The defendant (railway company), received the goods from the Southern Railway Company and delivered them in damaged condition. Where the damage was done does not appear.

"It seems to follow from the decision in this case (the State Court's decision), that the terminal carrier is held for a loss anywhere along the line and for penalty, unless it proves that the property never came into possession, etc., or succeeds in shifting the loss within the forty days allowed.

"It is true that in the opinion of the Supreme Court (of the state) the judgment is spoken of as being for damage done to a shipment while in defendant's possession within this state, and it is said that the statute limits liability to such damage. But in view of the record, *this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible, is itself in fault.* The defendant happened to be the last carrier of the line, *and in many states, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remained so until the latest moment when it could have been harmed.* But, while this seems to have made its first appearance in the guise of a true presumption of fact, *it became, if it was not always, a rule of substantive law,* a rule of convenience, calling on the last carrier to explain. * * * The rule is stated as a rule of policy in South Carolina, and the statute makes it still more clearly so, since, with the limits that we have stated, it applies indifferently to any carrier in the line, if within the State, according to the accident of the plaintiff's demand. *The case, then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the state, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law.*

"The South Carolina law has been amended and enlarged in scope since that decision (Mazursky

case), but it is less necessary to scrutinize those changes than to consider the modifications of the United States law. As it now stands, that law (U. S. law) requires the initial carrier to issue a through bill of lading and makes it liable for all damages anywhere on the route.

"As was said in *M. K. & T. Ry. vs. Harris,* 234 U. S. 412-420, the result of many recent cases, there cited, beginning with *Adams Express Company vs. Croninger,* 226 U. S. 491, and coming down through *Boston & Maine Railroad vs. Hooker,* 233 U. S. 97, is that *the special regulations and policies of particular states upon the subject of the carriers' liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto have been superseded.*

"The South Carolina Act * * * extends the liability to losses on other roads in other jurisdiction and increases it by a fine difficult to escape. It overlaps the Federal Act in respect of the subjects, the grounds, and the extent of liability for loss."

This court holds, therefore, that the so-called presumption which has been pronounced by the Supreme Court of Nebraska in the case at bar is in effect *a rule of substantive law* conceived as a policy of the state *which is in conflict with the supremacy of the national law on the same subject,* namely, the liability of carriers of interstate commerce, and that such rule is therefore inapplicable.

This Court has held in the case of *N. Y. C. & H. R. Ry Co. vs. Beaham,* 242 U. S. 148:

"The transactions in question related to interstate commerce, consequent rights and liabilities de-

pend upon acts of Congress, agreement between the parties and common-law principles accepted and enforced in Federal Courts."

Your Petitioner was, therefore, entitled to immunity from liability under the Interstate Commerce Act, except upon affirmative proof that your Petitioner, as delivering carrier, actually caused the damage to the goods. Such, we believe, is the effect of the holdings of this court above cited.

CONCLUSION

In conclusion, your Petitioner respectfully submits that the foregoing Petition for a Writ of Certiorari should be granted and the record in this case sent up for final review and determination by this court, inasmuch as the question is one of importance and gravity involving a right, privilege and immunity accorded to your Petitioner under the Interstate Commerce Act, which has been denied by the decision of the Supreme Court of the State of Nebraska.

Respectfully submitted,

A. A. Lyman Dressler

Counsel for Petitioner.

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Office Supreme Court, U. S.
FILED
MAR 3 1922
WM. R. STANSBURY
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 146.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

C. C. WHITNACK PRODUCE COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

ADDITIONAL BRIEF OF RESPONDENT.

ELMER J. BURKETT,
HENRY H. WILSON,
ELMER W. BROWN,
RALPH P. WILSON,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 146.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

C. C. WHITNACK PRODUCE COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

Only a Federal Question Will Be Considered.

This case being here on a writ of certiorari directed to the Supreme Court of Nebraska, only a Federal question will be considered by this court.

Grame *vs.* Mutual Assurance Company, 112 U. S., 273.

Egan *vs.* Hart, 165 U. S., 188.

Rankin *vs.* Emigh, 218 U. S., 27.

Brinkmeier *vs.* Missouri Pac. Ry. Co., 224 U. S., 268.

Where Case Originates in Federal Court the Rule is Different.

Where a case originates in a Federal court and the original jurisdiction of trial court rests on a Federal question, the whole case comes to this court

Louisville & Nashville R. R. Co. *vs.* Finn, 235 U. S., 601.

Ohio Tax cases, 232 U. S., 576-587.

This case being here on a writ of certiorari directed to the Supreme Court of a State, this court will pass only upon a Federal question if involved.

In Grume *vs.* Mutual Assurance Co., *supra*, this court on a writ of error to the Supreme Court of Virginia refused to review the decision of the State court construing a policy of fire insurance.

In Brinkmeier *vs.* Missouri Pac. Ry. Co., *supra*, this court said:

> "Although the petition may declare under a Federal statute, if it states no cause of action thereunder, but at most a right of recovery at common law, rulings on the sufficiency of evidence do not involve Federal questions."

In the case at bar the petitioner in the trial court set forth a cause of action at common law against the terminal carrier, and what evidence will or will not support a judgment rendered on such a petition does not present a Federal question.

The existence or non-existence of a common-law presumption against the terminal carrier is not a Federal, but a common-law question.

The question of the existence or non-existence of such presumptions not being Federal cannot give this court jurisdiction of a writ of certiorari directed to the Supreme Court of a State.

The decision of the State court applying such presumptions has become the law of this case, and this court will not, in this kind of case, inquire into the correctness of such decisions.

Respectfully submitted.

ELMER J. BURKETT,
HENRY H. WILSON,
CLARK W. BRYAN,
RALPH P. WILSON,
Counsel for Defendant in Error.

General Number 27927.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 146.

OCTOBER TERM, A. D. 1921.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

C. C. WHITNACK PRODUCE COMPANY, DEFENDANT IN ERROR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

ELMER J. BURKETT,
HENRY H. WILSON,
ELMER W. BROWN,
RALPH P. WILSON,
Attorney for Defendant in Error.

SCOPE OF REMEDY.

Counsel for Plaintiff in Error has entirely misconceived our argument as to the purpose for which the Carmack Amendment was passed. While the remedy

given by that amendment against the initial carrier inures to the benefit of any holder of the through bill of lading, yet it is clear that the chief purpose in the enactment was to furnish the shipper a convenient and efficient remedy when under his contract of sale, he must bear the loss occurring in transportation. We did not contend and do not now contend that the remedy under the amendment was limited to the consignor, nor is the remedy given by the common law against the terminal carrier limited to the consignee. In the nature of the business of transportation, however, the remedy against the initial carrier will usually be employed by the consignor, while the common law remedy against the terminal carrier will usually be employed by the consignee.

RIGHTS AND REMEDIES NOT INCONSISTENT WITH THE AMENDMENT ARE PRESERVED.

In asserting our common law rights and remedies against the terminal carrier, we do not rely upon the saving clause in the Carmack Amendment. We, however, do contend that all remedies either at common law or under state or congressional statutes that existed before the passage of the Carmack Amendment, are still available, unless they are *inconsistent* with the provisions of that statute.

Counsel seems to argue that all rights and remedies available to the consignor or consignee, must be found in the statutes of Congress. This clearly can not be the law.

In the case of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, Mr. Justice White, after defining the common law liability of the carrier, said:

> "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principles that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

In the case of *Western Union Telegraph Co.* v. *Call Publishing Company*, 181 U. S. 92, 21 Sup. Ct. 561, in answer to the argument that the statutes enacted by Congress were the sole source of the law applicable to interstate commerce, Mr. Justice Brewer said:

> "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that

> to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment."

In the case of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S .426, 27 Sup. Ct. 350, the court construing the saving clause contained in the statute then under review, said:

> "But it is insisted that, however cogent may be the views previously stated, they should not control because of the following provision contained in Sec. 22 of the act to regulate commerce, viz.: '* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. This clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

In the case of *Adams Express Co.* v. *Croninger*, 226

U. S. 491, cited and relied upon by plaintiff in error, holds directly contrary to its contention. It is there held that notwithstanding the Carmack Amendment, it was "intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or by common-law, not inconsistent with the rules and regulations prescribed by the provisions of this act."

We do not contend that this is by virtue of the saving clause in the statute, but contend that it would be equally true if there were no saving clause. A statute granting a new remedy will not be construed to abrogate or modify an existing remedy, unless the latter is inconsistent with the terms of the statute. There is nothing in the Carmack Amendment that expressly continues in force, the liability of the terminal carrier or indeed, the liability of any carrier for damages occurring on its own line. This liability existed at common law before the statute was passed and still exists and exists with all the presumptions recognized by the common-law in full force and effect, and it is upon this doctrine that we rest this case.

PRESUMPTION NOT AVAILABLE TO CARRIER.

Counsel cites the case of *Carlton Produce Co.* v. *V. B. & N. Ry. Co.*, 131 S. W. 1187, in support of the rule that the common law presumption against the terminal carrier was abrogated by the Carmack Amendment.

However, all this case holds is that:

> "Whatever presumption may have existed prior to the enactment of 1906, that the damages occurred on the line of the final carrier, can have no place in construing the liability of the carrier on whose line the damages occurred *to the initial carrier,* because the right of the initial carrier to recover against a connecting carrier is made to rest alone on proof that the damages occurred on that line."

This is clearly the law quite regardless of the Carmack Amendment. There never was any presumption against any connecting carrier in favor of another connecting carrier as to the point at which the goods were injured. The carriers stand on an equal footing as to information on the question of where the injury occurred and the common law never raised the presumption in favor of one carrier as against another. The presumption exists only in favor of the shipper.

Galveston H. & S. A. Ry. Co. v. *Jones*, 123 S. W. 737 (Tex.).

Central of Georgia Ry. Co. v. *Chicago Varnish Co.*, 53 So. 832 (Ala.).

PRESUMPTION APPLIES TO SHIPMENT IN SEALED CARS.

Counsel for plaintiff in error contends that because it has become the custom to ship perishable freight in refrigerator cars under seal and that it is not practicable for the delivering carrier to ascertain the condi-

tion of the goods by inspection when they come into its hands, that therefore, the presumption against the terminal carrier should not be applied. It has never been held that the inconvenience in inspecting goods coming on to the line of the terminal carrier had any effect upon the presumption under discussion here. The presumption has been applied by the courts where goods were shipped in sealed cars, enclosed boxes and sealed packages to the same extent and like effect as to goods shipped under other conditions.

Leo v. *St. Paul, M. & M. Ry. Co.*, 15 N. W. 872 (Wis.).

Bube v. *Wisconsin Cent. Ry. Co.*, 95 N. W. 454 (Minn.).

Cole v. *New York, H. H. & H. R. Co.*, 65 N. E. (Mass.).

Faison v. *Alabama & V. Ry. Co.*, 13 So. 37 (Miss.).

Statze v. *Am. Arbor R. Co.*, 134 N. W. 376 (Wis.).

Colbarth v. *Bangor & A. R. Co.*, 74 Atl. 918 (Me.).

PRESUMPTION NOT ABROGATED BY CARMACK AMENDMENT.

Since the preparation of our principal brief herein, there have been published the opinions in two more cases holding that the Carmack Amendment did not abrogate the presumption against the terminal carrier

and these cases should be added to the list contained on page 19 of our original brief.

People's Hardware Co. v. *Raleigh & C. R. Co.*, 107 S. E. 146 (So. Car.).

Pittsburgh C. C. & St. L. R. Co. v. *Larosa*, 131 N. E. 22 (Ind.).

A WORTHLESS REMEDY.

Counsel for plaintiff in error says he does not contend that a holder of a bill of lading in an interstate shipment should not be permitted to sue the delivering carrier, but he does contend that he should be permitted to recover only upon affirmative proof that the damages occurred on that line This concession is entirely inconsistent with the claim that the duties of common carriers are to be found only in the statutes of Congress.

The liability of the delivering carrier for injury occurring upon its own line is not defined by the laws of Congress, but rests entirely upon the common law doctrine of the liability of the common carrier. The practical value, however, of this remedy, lies in the common law presumption that goods delivered in good order to the initial carrier and redelivered in a damaged condition by the terminal carrier, were injured on the latter. To destroy this common law presumption would be,, in practical effect, to destroy the cause of action entirely, as in practice it would be wholly worthless without aid of the presumption. Counsel seems ready to concede the right of action, provided it is rendered

worthless and practically inoperative by the abrogation of the common law presumption. It is fair to presume that if Congress intended to preserve the common law liability of the terminal carrier and to permit the shipper to use his common law remedy against such terminal carrier, that it also intended to leave untouched the common law presumption that alone could render that remedy efficient.

Respectfully submitted,

ELMER J. BURKETT,
HENRY H. WILSON,
ELMER W. BROWN,
RALPH P. WILSON,
Attorneys for Defendant in Error.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term A. D. 1921

No. 146

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error.

vs.

C. C. WHITNACK PRODUCE COMPANY,

Defendant in Error.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

REPLY BRIEF OF PLAINTIFF IN ERROR

The burden of the argument presented in the brief of defendant in error is that the Carmack Amendment to the Interstate Commerce Act does not control this case because, they say, it is an action based upon the common law to which the Carmack Amendment has no application.

They say that the common law presumption applied by the state court against the delivering carrier is a remedy

in favor of the *consignee of* the goods while the provision of the Carmack Amendment to the Federal Act holding the initial carrier liable is a remedy given by Congress in favor of the *shipper.*

We reply:

The Remedy Given by The Carmack Amendment is not to the SHIPPER or CONSIGNEE but to the Owner and Holder of the Bill of Lading.

Section 20 of the Federal Act provides:

> "That any common carrier, railroad or transportation company subject to the provisions of this act, etc. * * * Shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such propery caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, etc."

Thus the Carmack Amendment to the Federal Act covered the whole field of Interstate commerce and the remedy afforded is in favor of the holder of the bill of lading, whether the shipper or consignee or both. It is a remedy as much in favor of the consignee as of the shipper or anyone who may become the lawful holder of the bill of lading.

Counsel in their brief say that it is unthinkable that Congress would have destroyed the remedy of the consignee at common law—that is, the presumption referred to—by creating a remedy in favor of the shipper. They refer to the proviso of *Section 20,* which says:

> "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."

We reply:

The Rights and Remedies Preserved by the Federal Act, Were Federal Remedies Only; and Since There is no Federal Presumption Against the last Carrier, it was not Preserved by the Federal Act.

This Court has repeatedly held that the proviso:

> "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

is construed to relate to existing federal law and not to any state law.

> Adams Express Company vs. Croninger, 226 U. S. 491.
> C. St. P. M. & O. Ry. Co. vs. Latta, 226 U. S. 519.

Therefore, since,

There is no Common Law of the State Applicable to Interstate Shipments Save and Except Such Common Law Rules as are Recognized and Approved by Federal Courts,

the argument of counsel for defendant in error is beside the point.

We repeat that the Carmack Amendment has given to all holders of bills of lading for interstate shipments, whether such holders were the shippers, consignee, notify parties or whatever relation they sustained to the shipment —complete remedy for damage to the goods in interstate commerce. There is no necessity for the presumption indulged by the state court. Since the presumption was supposed to be the creature of necessity and the necessity no longer exists the presumption itself no longer exists as to interstate shipments.

Counsel for defendant in error have cited numerous decisions from state courts to the effect that the presumption applied by the state court exists. The contrary rule is stated in *Carlton Produce Co.* vs. *V. B. & N. Ry. Co.*, 131 S. W. 1187 as well as in some other cases. Since one of the dominant purposes of the Carmack Amendment was to secure uniformity of rule concerning liability of carriers for interstate shipments we submit that public policy would be much better conserved by a holding that there is no such presumption as to interstate shipments, leaving the holder of the bill of lading to the demedy prescribed by the Carmack Amendment against the initial carrier.

We do not contend of course that the holder of the bill of lading of an interstate shipment should not be permitted to sue the delivering carrier, but he should recover only upon affirmative proof that the delivering carrier caused the loss.

In these days of modern commerce when shipments of perishable freight in refrigerator cars must be transported under seal; and to open the cars would be equivalent to a destruction of the shipment; it is not practicable that the delivering carrier can ascertain the condition of a shipment when it reaches its line by an inspection of the goods. Therefore, to invoke the presumption against the delivering carrier is equivalent in fact to holding it liable for damages to the goods on the lines of preceding carriers with no remedy in its favor against such preceding carriers.

We therefore respectfully submit that the presumption does not exist as to interstate shipments and we again ask that the judgment of the state court be reversed.

Respectfully submitted,

WYMER DRESSLER,
Attorney for Plaintiff in Error and Petitioner.